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No. 505

In the Supreme Court of the United States

OCTOBER TERM, 1938

JAMES H. MULFORD ET AL., APPELLANTS

v.

NAT SMITH ET AL., AND THE UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court (R. 183) is reported in 24 F. Supp. 919.

JURISDICTION

Jurisdiction of the Court rests on Section 3 of the Act of August 24, 1937, c. 754, § 3, 50 Stat. 752 (28 U. S. C. Supp. III, Sec. 380a). The decree of the District Court was signed October 5, 1938, and entered October 7, 1938. The petition for appeal was presented and allowed October 18,

1938, and filed October 21, 1938. The case was docketed in this Court December 5, 1938. The Court noted probable jurisdiction January 3, 1939.

QUESTIONS PRESENTED

1. Whether the provisions of the Agricultural Adjustment Act of 1938 for the establishment of marketing quotas for flue-cured tobacco are a constitutional exercise of the power of Congress to regulate interstate and foreign commerce.

2. Whether those provisions of the Agricultural Adjustment Act of 1938 provide for an unconstitutional delegation by Congress of its legislative powers.

3. Whether those provisions of the Agricultural Adjustment Act of 1938 deprive the appellants of liberty or property in violation of the Fifth Amendment to the Constitution of the United States.

4. Whether those provisions of the Agricultural Adjustment Act of 1938 as applied in 1938 to the marketing of flue-cured tobacco produced before the establishment of farm marketing quotas for 1938 deprive the appellants of property in violation of the Fifth Amendment to the Constitution of the United States.

NATURE OF THE PROCEEDING

The appellants, plaintiffs below, are numerous growers of flue-cured tobacco whose farms are lo-

cated in southern Georgia and northern Florida (R. 44). Each of the defendants below, and appellees here (with the exception, of course, of the United States), operates one or more tobacco auction warehouses in Valdosta, Lowndes County, Georgia, near the Florida border (R. 44).

During the 1938 flue-cured tobacco marketing season, each of the appellants marketed, through one or more of the appellees as warehouseman, flue-cured tobacco in excess of the marketing quota established for his farm under Section 313 of the Agricultural Adjustment Act of 1938 (52 Stat. 31, as amended, U. S. C., Title 7, Secs. 1281, *et seq.*) (R. 44). Section 314 of that Act requires tobacco auction warehousemen to pay to the Secretary of Agriculture a penalty equal to 50 percent of the price of any tobacco,[1] sold through them, in excess of the marketing quotas for the farms on which the tobacco was grown, and permits them to deduct the amount of the penalty from the prices paid to producers.

The appellants brought this suit in the Superior Court of Lowndes County, Georgia, to enjoin the warehousemen from deducting amounts equivalent to such penalties from the price paid to them for such excess tobacco and from remitting such amounts to the Secretary of Agriculture, on the alleged ground that the provisions of Sections 312,

[1] The minimum penalty is three cents per pound (Sec. 314).

313 and 314 of the Act, which provide for the quotas and prescribe the penalties, are unconstitutional.

The warehousemen, as defendants, removed the case to the United States District Court for the Southern District of Georgia, and the United States intervened as a party defendant in the District Court under Section 1 of the Act of August 24, 1937 (c. 754, Sec. 1, 50 Stat. 751 (28 U. S. C. Supp. III, Sec. 401)). On September 23, 1938, the case was heard on a stipulated record by a three-judge court established pursuant to Section 3 of that Act (28 U. S. C. Supp. III, Sec. 380 (a)). That court upheld the challenged provisions of the Act. The appellants ask this Court to reverse that decision.

STATUTE INVOLVED

The legislation here challenged comprises only those portions of the Agricultural Adjustment Act of 1938 which (1) provide that when the supply of flue-cured tobacco is found to exceed a level defined in the Act as the "reserve supply level," a national marketing quota shall become effective which will permit enough flue-cured tobacco to be marketed during the next marketing year to maintain the supply at the reserve supply level, (2) provide for the apportionment of the national quota—in terms of pounds which may be marketed—to the farms on which such tobacco is grown, and (3) provide for the payment of penalties by tobacco

auction warehousemen in connection with the marketing of flue-cured tobacco, in excess of such farm marketing quotas.

The statute of which these provisions are a part comprises five titles, and contains, in addition to the provisions here challenged, many provisions, not relevant to this case, which deal in varying ways with many other phases of the problems of agriculture.[2]

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[2] The Act was approved February 16, 1938 (52 Stat. 31). Amendments were approved March 26, 1938 (52 Stat. 120); April 7, 1938 (52 Stat. 202); May 31, 1938 (52 Stat. 586); and June 20, 1938 (52 Stat. 775).

This case relates solely to the provisions in Title III for marketing quotas for flue-cured tobacco. These are to be found primarily in *Sub-title B, Marketing Quotas, Part 1*, "*Marketing Quotas—Tobacco*," which comprises Sections 311 to 314 of the Act. The appellants' bill as amended seeks to have declared unconstitutional only Section 312 (a), (b), (c), (d), and (e); Section 313 (a), (b), (c), and (d), and Section 314 (R. 3, 9, 29).

However, in order to understand fully the operation of the quota provisions, it is necessary to refer to some of the definitions contained in Section 301, to some of the general administrative provisions found in Sections 361 to 376, to Sections 388 and 389, authorizing utilization of local agencies and the personnel of the Agricultural Adjustment Administration in carrying out the Act, and to Section 390 relating to separability.

These provisions of the Act are all set out in the Appendix, p. 177, *infra*. In this brief, in the interest of brevity we shall refer to them as "the Act", to the exclusion of the provisions not involved in this case. Moreover, references in this brief to "tobacco" will apply to flue-cured tobacco only, unless the context indicates otherwise, and references to the marketing year 1938 shall be taken to mean the

The provisions which principally affect the questions raised by this case may be summarized as follows:

LEGISLATIVE FINDING

Section 311 is a summary finding by Congress of the facts concerning the marketing of tobacco which, in the judgment of Congress, require, and, under the Constitution, justify the exercise of the federal commerce power through the regulation of tobacco marketing which the challenged provisions impose.

This finding states the determination by Congress that the marketing of tobacco is "one of the great basic industries of the United States with

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marketing year for flue-cured tobacco beginning July 1, 1938, and ending June 30, 1939.

Title I contains amendments to the Soil Conservation and Domestic Allotment Act. Title II provides for arranging adjustments in freight rates for farm products; for means of discovering and developing new uses and markets for farm products, and for continuation of the provisions previously made for distribution of surplus agricultural commodities for relief purposes through the Federal Surplus Commodities Corporation. Title IV provides for taking up and cancelling certain cotton pool participation trust certificates issued in connection with the 1933 Cotton Producers Pool. Title V provides for a federal crop insurance corporation and its operation.

Title III includes, in addition to the provisions here challenged, provisions for loans on agricultural commodities; an authorization for the making of parity payments to producers of certain farm products if, and when, funds are appropriated for that purpose; and provisions for marketing quotas for corn, wheat, cotton, and rice. None of those other provisions of Title III are involved in this case.

ramifying activities which directly affects interstate and foreign commerce"; that stable conditions in the marketing of tobacco are necessary to the general welfare; that tobacco is sold on a national market and, with its products, moves almost wholly in interstate and foreign commerce; that for reasons beyond their control farmers are unable, without federal assistance, to accomplish the orderly marketing of tobacco; that, consequently, abnormally excessive supplies are produced and dumped indiscriminately on the national market; that the disorderly marketing of such excessive supplies burdens and obstructs interstate and foreign commerce by its effect upon the volume of tobacco marketed in such commerce, by disrupting orderly marketing, by causing reduction of tobacco prices and consequent injury to interstate and foreign commerce in tobacco, and by causing disparity between the price of tobacco in interstate and foreign commerce and the prices of industrial products in such commerce and consequently diminishing the volume of interstate and foreign commerce in industrial products.

The section concludes with the specific finding that whenever an abnormally excessive supply of tobacco exists, the marketing of tobacco by the producers directly and substantially affects interstate and foreign commerce in tobacco and that the establishment of quotas as prescribed by the Act becomes necessary and appropriate in order to pro-

mote, foster, and maintain an orderly flow of tobacco in interstate and foreign commerce.[3]

NATIONAL MARKETING QUOTA

In conformity with these findings, the Act does not provide for continuous regulation of tobacco marketing. The regulation becomes effective only when the Secretary of Agriculture has found that the supply of tobacco exceeds an amount—the reserve supply level—determined by Congress to be so great as to threaten interstate and foreign commerce with the disruption described in Section 311.

More specifically the Act provides that whenever, on November 15th of any year, the Secretary of

[3] This finding, although summary in form, embraces legislative conclusions based upon long experience and extensive study of agricultural problems by Congress. The facts presented to Congress as the basis for the tobacco quota provisions are somewhat more fully set out in the reports of the House and Senate Committees on the Bill which eventually became the Agricultural Adjustment Act of 1938. The pertinent portions of these reports appear in the Appendix at pages 205 to 240. These in turn reflect the vast accumulation of facts available to Congress, relating to the tobacco industry in particular as well as agriculture generally. A subcommittee of the Senate Committee on Agriculture and Forestry had held many hearings throughout the country during 1937, concerning problems relating to agriculture. The matters covered by such hearings are contained in a document of 4,633 pages, entitled *General Farm Legislation*, of which 1,916 pages relate to cotton, tobacco, and rice. Moreover, the committees of Congress had available reports of many earlier studies and hearings dealing with farm problems. The titles and subjects of these reports are set forth in the Record (R. 47–49).

Agriculture finds that the total supply of tobacco[4] as of July 1st of that year, exceeded the reserve supply level,[5] he shall, by December 1st, proclaim the total supply, and a national marketing quota shall be in effect throughout the marketing year which commences the following July 1st (Sec. 312 (a)).[6]

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[4] The *total supply* "for any marketing year shall be the carry-over at the beginning of such marketing year, plus the estimated production thereof in the United States during the calendar year in which such marketing year begins" (Sec. 301 (b) (16) (B). The marketing year begins July 1st (Sec. 301 (b) (7)).

The *carry-over* for any marketing year is the quantity on hand on July 1, which was produced in the United States *before* the beginning of that calendar year (Sec. 301 (b) (3) (C)). It does not include any of the current year's production.

[5] The *reserve supply level* is "the normal supply plus 5 per centum thereof, to insure a supply adequate to meet domestic consumption and export needs in years of drought, flood, or other adverse conditions, as well as in years of plenty" (Sec. 301 (b) (14) (B)).

The *normal supply* is the sum of (a) 275 percent of *a normal year's domestic consumption*, and (b) 165 percent of *a normal year's exports* (Sec. 301 (b) (10) (B)).

A normal year's domestic consumption and *a normal year's exports* are the ten-year annual average domestic consumption and the ten-year annual average exports, respectively, adjusted for current trends in such consumption or exports (Sec. 301 (b) (11) (B) and Sec. 301 (b) (12)).

[6] The Act not having been approved until several months after November 15, 1937, provided, with respect to the marketing year beginning July 1, 1938, the year for which the quotas involved in this case were effective, that the proclamation of the total supply and of the national marketing quota should be made within fifteen days after the approval of the Act (Sec. 312 (d)).

At the same time the Secretary is to proclaim also the amount of the national marketing quota (Sec. 312 (a)) in terms of the total quantity of tobacco which may be marketed during the ensuing marketing year. This marketing quota is the amount which the Secretary finds will make available during the ensuing marketing year a supply of tobacco equal to the reserve supply level (Sec. 312 (a)).[1]

APPORTIONMENT OF NATIONAL QUOTA TO FARMS

Within thirty days after proclamation of the total supply and the national marketing quota, the Secretary is to conduct a referendum among farmers who produced the tobacco crop harvested prior to holding of the referendum, to determine whether such farmers favor or oppose such quota. If more than one-third of the farmers voting in the referendum oppose the quota, the Secretary is to proclaim the result of the referendum before Janu-

[1] The Secretary is authorized to terminate or increase a national marketing quota which has become effective if he finds, upon investigation, that the operation of the quota will cause the amount of tobacco free of marketing restrictions for the then current marketing year to be less than the normal supply (Sec. 371 (a)) or, if upon investigation, he finds it necessary that the quota be increased because of a national emergency or a material increase in export demand (Sec. 371 (b)). In case of increases under either of these provisions the farm marketing quota of each farm is to be increased proportionately.

ary 1, and in such case the quota shall not be effective thereafter (Sec. 312 (e)).[8]

The Act provides next for the apportionment of the national quota. It is first apportioned among the states (Sec. 313 (a)). Each state's share is based on the total quantity of tobacco produced in the state during the five years immediately before the year in which the quota is proclaimed, plus the normal production of the acreage in the State diverted from tobacco under any agricultural adjustment or conservation program operative during any of those years. This basic determination is subject to adjustments found necessary to correct the state allotments for plant diseases, production trends or abnormal conditions of production which affected production in the several states during the five-year period, and to make provision for the minimum requirements for small farms. In order to avoid excessively sharp reductions the Act provides that no State is to be allotted an amount less than 75 percent of its 1937 tobacco production.

After the State allotment is made it is apportioned among farms in the State on which tobacco is produced in the current year and has been produced previously in one or more of the four years preceding the year in which the quotas are to be-

[8]The Act not having been approved until February 1938, provided that with respect to the 1938 quotas any proclamation of the result of the referendum should be made within 45 days after approval of the Act.

come effective (Sec. 313 (b)).[9] These will be referred to as "old" tobacco farms. The apportionment to old tobacco farms is made on the basis of: "past marketing of tobacco making due allowance for drought, flood, hail, other abnormal weather conditions, plant bed, and other diseases; land, labor, and equipment available for the production of tobacco; crop rotation practices; and the soil and other physical factors affecting the production of tobacco." The Act provides a minimum allotment of 3,200 pounds or the average production during the preceding three years, plus the average normal production of any acreage diverted from tobacco under the agricultural adjustment or conservation programs operative during any such years, whichever is the smaller (Sec. 313 (b)). The Act provides also for allotments to "new" tobacco farms to be made on a slightly different basis.[10]

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[9] By successive amendments approved April 7, 1938, and May 31, 1938 (Sec. 313 (e)), the poundage available for apportionment in each state for 1938 was increased by an amount not exceeding four percent of the state's allotment. This additional poundage was required to be apportioned, in such amounts as the Secretary determined to be fair and reasonable, to farms in the state receiving allotments under the Act which the Secretary should find to be inadequate in view of past production. The national quota was increased in proportion and the additional poundage thus made available to each state was apportioned as an additional allotment to individual old tobacco farms. None of it was apportioned to new tobacco farms, inasmuch as they had no history of past marketing (R. 135).

[10] A reserve of not to exceed 5 percent of the national quota is to be withheld from the apportionment to the states

The apportionment of the quota to individual farms is made through local committees of farmers [11] according to the standards just described, amplified in detail by the regulations and instructions issued by the Secretary (R. 42, 43, 103–173). Each farmer is notified of the marketing quota for his farm by mail, and lists of the quotas of individual farms in each county or other local administrative area are required to be kept freely available for public inspection in the county or local area where the farm is located (Sec. 362; R. 153, 154). The Act and the regulations provide for review of the quotas, including judicial review (Sec. 363–368; R.

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and used for making apportionments directly to farms in any state (whether the state has a quota or not) on which, for the first time in five years, tobacco is produced to be marketed in the marketing year for which the quota is effective (these will be referred to as "new tobacco farms") and for increasing allotments required to be made to small, old tobacco farms (see Sec. 313 (b) and Sec. 313 (c)).

These new tobacco farms have no history of past marketing during the immediately preceding years. Accordingly, the apportionment made to such farms is based on the same factors as for "old" farms but without any allowance for past marketing; but their quotas are not to exceed 75 percent of the quotas established for similar old farms.

The minimum allotment for small farms does not apply to new tobacco farms (Sec. 313 (b)).

[11] The local committees used in the determination of the farm marketing quotas, as provided for by Section 313 (b) and (c) are, by virtue of Section 388 of the Act, the same committees as those established under Section 8 (b) of the Soil Conservation and Domestic Allotment Act as amended (Appendix, pp. 178, 202).

155–162),[12] and for their transfer subject to regulations (Sec. 313 (d); R. 114–117).

PENALTIES FOR SALE OF EXCESS TOBACCO

In case any tobacco in excess of the quota for the farm on which the tobacco is produced,[13] is marketed through a warehouseman, the warehouseman is required to pay to the Secretary of Agriculture a penalty[14] equal to 50 percent of the

[12] The Act provides for review of any quota upon application by the farmer within fifteen days after the notice is mailed. The first review is by a committee of three farmers appointed by the Secretary (Sec. 363–364; R. 156–157). The regulations governing such review provide for notice and hearing before the review committee (R. 157–161). Unless application for review is made within fifteen days the quota originally allotted is final (Sec. 363).

If the farmer is dissatisfied with the review committee's determination, he may, within fifteen days after notice of that determination, file a bill in equity against the review committee in the United States District Court or commence proceedings for review in any State court of record having general jurisdiction and sitting in the county or district in which the farm is located (Sec. 365–367; R. 161, 162). Increases in individual quotas resulting from such review do not require proportionate reduction in other quotas (Sec. 368).

[13] Except tobacco sold for nicotine or other by-product uses (Sec. 314) and except tobacco grown for experimental purposes only by a publicly owned experimental station (Sec. 372 (d)).

[14] (Sec. 314 and Sec. 372 (b)). In case the tobacco is marketed directly to a person outside the United States, the producer is required to pay the penalty. In case the tobacco is sold by the grower directly to the purchaser without intervention of a warehouseman or other agent, the buyer is required to pay the penalty, but the buyer may deduct

market price of the excess tobacco.[15] The warehouseman may deduct an amount equivalent to the penalty from the price paid to the seller for the tobacco (Sec. 314).[16]

The Act imposes no limitation upon the acreage of tobacco which may be planted or produced, and imposes no penalty for planting or producing a quantity of tobacco in excess of the marketing quota or for producing any quantity of tobacco whatever that the grower may choose to produce. Nor does it provide any criminal sanctions for enforcing limitation of marketings to the amount of the quotas.[17] If payment of such penalties should not be made, the sole legal remedy provided is a civil action by the United States for their recovery (Sec. 376).

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an amount equivalent to the penalty from the price paid to the grower (Sec. 314). All of the excess tobacco involved in this case was marketed through warehousemen.

[15] The penalty is to be three cents per pound if that rate is higher than 50 percent of the market price (Sec. 314).

[16] The Act provides (Sec. 372 (b),) for the collection of the penalties in such manner, at such time, and under such conditions as the Secretary prescribes by regulations and that the penalties collected shall be covered into the general fund of the Treasury of the United States. It provides also that the Secretary shall provide by regulations for refund, upon claim filed within a year after receipt of the payment by the Secretary, of penalties erroneously, illegally, or wrongfully collected.

[17] In order to aid the collection of penalties, the Act requires the Secretary to provide such regulations as are necessary for identifying the tobacco subject to quotas, and generally to prescribe regulations necessary for the enforce-

STATEMENT

A. HISTORY OF THE CASE

The Act was approved February 16, 1938. On February 18, 1938, the Secretary of Agriculture proclaimed his finding that the total supply of flue-cured tobacco for the marketing year beginning July 1, 1937, exceeded the reserve supply level and proclaimed the amount of the national marketing quota for the marketing year beginning July 1, 1938 [18] (R. 40, 93–95).

On March 12, 1938, a referendum was held among growers who had participated in the production of the 1937 tobacco crop to determine whether they favored or opposed the marketing quota (R. 41, 95–101). On March 25, 1938, the Secretary proclaimed that 86.2 percent of the growers voting favored the quota, while 13.8 percent opposed it (R. 41, 101).

On June 16, 1938, the Secretary issued instructions for determining flue-cured tobacco farm marketing quotas for 1938 and prescribed forms

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ment of the Act (Sec. 375). It also authorizes the Secretary to require the keeping of records and the making of reports. The sole criminal provision of the pertinent provisions of the Act is the imposition upon handlers other than producers of a fine of $500 for conviction of failure to make any report or keep any record required, or for making any false report or record (Sec. 373 (a) (b)).

[18] The total supply found was 1,733,000,000 pounds; the reserve supply level 1,681,000,000, and the national marketing quota, which would make the reserve supply level available the next marketing year, 705,000,000 pounds (R. 95).

for use in connection therewith (R. 43, 127–151). On July 13, 1938, the Secretary issued regulations governing the publication, notice, and review of farm marketing quotas and prescribed forms for use in connection with such regulations (R. 43, 151–172). On July 22, the Acting Secretary of Agriculture issued regulations relating generally to 1938 flue-cured tobacco marketing quotas, penalties, marketing cards, transfer of quotas, and records and reports. Forms were also prescribed for use in connection with such regulations (R. 42, 103–127).

On July 22, 1938, the Acting Secretary also announced the adjusted apportionment of the national marketing quota among states on the basis of estimated requirements for minimum allotments for small farms and on August 13, 1938, announced a revision of such apportionment based upon subsequent information concerning actual requirements of the states for minimum allotments for small farms (R. 41, 42, 102, 103).

The 1938 national marketing quota was apportioned to flue-cured tobacco farms, including the appellants' farms, in accordance with the Act and with the regulations and instructions referred to above (R. 44, 47). Each appellant received notice of his farm's marketing quota shortly before the opening of the auction markets, but after he had largely, if not wholly, completed the planting, harvesting, curing, and grading of his tobacco (R. 45).

The quota of each appellant's farm was less than the amount of tobacco which subsequently was marketed from his farm in 1938.[19]

On July 27, 1938, before the Valdosta market opened for the sale of tobacco, the appellants filed their bill of complaint in the Superior Court of Lowndes County, Georgia, seeking to have the warehousemen temporarily restrained and enjoined from deducting the amount of the penalties from the price paid them for any excess tobacco they might sell and from remitting the amount so deducted to the Secretary of Agriculture. They sought also a permanent injunction in similar terms and further appropriate relief (R. 1–9). The Georgia Court granted the temporary restraining order on July 27, 1938, and ordered the warehousemen to deduct the amount of the penalties and pay the amount deducted to the Clerk of the Court (R. 9, 10).

On August 3, 1938, by order of the Georgia Court, numerous other growers were allowed to intervene as parties plaintiff and to adopt the allegations and prayer of the original plaintiff's petition (R. 11).

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[19] The appellants do not complain of the amount, as such, of the quotas established for their farms (R. 44), and concede that the proclamation of the national quota by the Secretary, the general apportionment and adjustment of quotas and the establishment of the marketing quotas for appellants' farms were accomplished in accordance with the Act and the regulations and instructions issued under it, and that all of their quotas were accurately determined in accordance with regulations and instructions (R. 47).

During the 1938 marketing season which, in Georgia, began about the first of August and ended about the first of September, the several appellants marketed tobacco in excess of their quotas through one or another of the defendant warehousemen, and penalties have been deducted and paid into court (R. 44).

On petition of the defendant warehousemen, filed in the Georgia Court on August 5, 1938, the case was removed to the District Court of the United States for the Middle District of Georgia at Valdosta. On August 9, 1938, the clerk of the District Court certified to the Attorney General of the United States that the constitutionality of the Agricultural Adjustment Act of 1938 was drawn in question and on August 18, 1938, the United States District Court entered its order permitting the United States to intervene as a party defendant (R. 16–18). On August 26, 1938, pursuant to Sec. 3 of the Act of August 24, 1937, the Honorable Rufus E. Foster, Senior Judge of the Fifth Circuit, designated the Honorable Samuel H. Sibley, Circuit Judge, and the Honorable Charles B. Kennamer, United States District Judge, to participate with the Honorable Bascom S. Deaver, Judge of the United States District Court for the Middle District of Georgia, in the hearing and determination of the case (R. 18, 19). On the same date the District Court continued the restraining order, modified to provide for payment of penalties deducted to the Clerk of the District Court rather than to the clerk of the Georgia Court

(R. 22–24). On August 29, 1938, plaintiffs and intervening plaintiffs filed certain amendments to the bill of complaint, including prayers that Section 312 (a), (b), (c), (d), and (e), Section 313 (a), (b), (c), and (d), and Section 314 be declared unconstitutional, and further, that such provisions of the Act be declared unconstitutional insofar as they apply to the marketing of petitioners' tobacco during 1938, and that the penalties imposed as a result thereof be declared null and void (R. 24–29).

On September 2, 1938, an answer was filed on behalf of the defendant warehousemen and the same day the United States, as intervening defendant, filed its separate answer (R. 29–37). The defendant warehousemen asked merely that they be decreed to be in the position of a stakeholder of funds collected and paid or to be paid into the registry of the court, that they be relieved of costs, and that they be protected against loss by reason of the penalties (R. 37).

On September 23, 1938, the case was heard on a stipulated record by the three-judge court established as described above. That court, in a decree signed by Judges Sibley and Kennamer, October 5, 1938, and entered October 7, 1938, denied the injunction, dissolved the restraining order, and dismissed the bill, holding (1) that Sections 312, 313, and 314 of the Act were constitutional and (2) that the application of the Act to the marketing season of 1938 also was constitutional (R. 183–190). The

Court ordered the funds in the hands of the clerk to be returned to the parties and reserved jurisdiction to hear and determine any disputes concerning the fund (R. 190–191). Subsequently, with the consent of appellees, this portion of the decree was stayed until final disposition of the cause (R. 194–195).

The pleadings and evidence before the court below disclose the following especially pertinent facts:

B. THE PRODUCTION OF FLUE-CURED TOBACCO

"Flue-cured tobacco is by far the most important class of tobacco grown in the United States. In 1937 flue-cured tobacco represented 55 per cent of the total tobacco marketed by producers and 60 per cent of the farm value of all tobacco marketed by producers in the United States" (R. 74). Flue-cured tobacco is grown in the group of states ranging from Florida to Virginia, with a small quantity being produced in Alabama (R. 52–53).

The growing of the annual crop of flue-cured tobacco begins in Georgia and Florida in December with the preparation of seed beds, followed soon afterwards by preparation of the land to which the plants are to be transplanted (R. 45). A considerable quantity of fertilizer is usually applied to the land before transplanting, and additional fertilizer is often applied in the course of subsequent cultivation. Transplanting begins about the first of April in Georgia and Florida. Six

thousand or more plants per acre are set out. Soon after the plants begin to grow, cultivation, consisting of plowing, poisoning for insects and worms, topping and removal of suckers, is begun and continues throughout the growing season (R. 45, 50–51).

Harvesting and curing begins in June and early July in Georgia and Florida and continues until all suitable leaves on the stalks have been removed. Harvesting is accomplished by pulling off the leaves as they mature. From four to six such "croppings" are usually required to harvest a crop (R. 51). After harvesting the leaves are strung on sticks and placed in the curing barn, where, for three or four days, the tobacco is "cured" by the continuous application of heat through "flues"—large pipes laid about the floor of the barn so that the smoke from the fuel used does not come into contact with the tobacco (R. 51). After curing, the tobacco is packed away, to be removed from the sticks later, sorted or graded, and prepared for marketing when the markets open. In Georgia and Florida the markets open about the first of August (R. 45, 51).

The steps just described had been largely, if not wholly completed by the appellants in 1938 before they received official notice of their 1938 farm marketing quotas under the Act. They received such notice, however, before the opening of the auction markets (R. 45).

C. METHODS OF MARKETING TOBACCO

Tobacco of all kinds is marketed principally through middlemen—auction warehousemen, wholesale merchants, exporters, export agents, brokers and cooperative marketing associations (R. 55). Approximately 85 percent of all tobacco is sold through auction warehouses. At present, sale through auction warehouses is about the only method of marketing tobacco extensively available in the flue-cured tobacco producing areas (R. 56). A few sales are made to dealers outside the auction warehouses, and occasionally sales are made through contracts entered into during the growing season, or are negotiated at the farm after the tobacco is harvested, but these methods are not widely used in selling flue-cured tobacco (R. 56).

In earlier years large quantities of flue-cured tobacco have been marketed through cooperative associations of producers (R. 56, 88–90). This method has long been used and continues to be used extensively in the marketing of Maryland and cigar leaf tobacco (R. 56). It could be equally available to flue-cured tobacco growers in lieu of selling at auction warehouses, although no cooperative associations were in operation in Florida and south Georgia during the 1938 marketing season (R. 56).

Before flue-cured tobacco can be kept in satisfactory condition in storage for future use it must

be redried and packed in hogsheads.[20] The buyers treat the tobacco they purchase in this way and store it from one to five years before manufacture.[21] Individual growers usually have been unable to do so because, individually, they have lacked facilities for redrying tobacco. By forming cooperative associations they can either operate their own redrying plants or have their tobacco redried in private plants (R. 56). They can thereby hold for later, more advantageous sale, tobacco which cannot be sold profitably during the short marketing season on the auction markets. Although cooperative associations have failed when they endeavored

[20] Most leaf tobacco is redried and stored before manufacture. Flue-cured tobacco delivered at the warehouse by the grower usually contains from 20 to 25 percent moisture which tends to prevent breakage in handling. Promptly after sale the tobacco is moved to redrying plants, where practically all of the original moisture is removed and a controlled amount added to condition the tobacco for packing in hogsheads. Redrying of flue-cured tobacco usually occurs within a week after purchase. Most of the dealers and manufacturers own redrying plants which are concentrated principally at manufacturing plants, points of export, and centers of supply (R. 62–64).

[21] In storage the tobacco ferments, or sweats, thereby eliminating certain acrid characteristics. Tobacco for domestic trade is usually transported to a point near the manufacturing plant of the owner and stored there. Foreign manufacturers have their own storage facilities abroad for aging tobacco. Accordingly exporters customarily do not store tobacco in the United States for any considerable length of time, but maintain a small reserve supply sufficient only to meet changes in the usual foreign demand. Such export tobacco as is stored in the United States is usually stored near the export center (R. 63, 64).

to control marketings they did perform valuable services in operating warehouses and redrying plants (R. 88). With marketing controlled this major cause for their failure has been eliminated.

D. OPERATION OF THE AUCTION MARKETS

The marketing season is fixed principally by the buyers and warehousemen (R. 61). The auction markets in Florida and Georgia open about the first of August and remain open for some 3 to 6 weeks. Markets in states farther north open later and continue open for a longer period, those in northern North Carolina and Virginia opening generally in September and continuing through the following February, with the greatest volume of sales in October or November (R. 61).

The auction warehouse method of selling tobacco in Georgia is practically unchanged since it was considered by this Court in *Townsend* v. *Yeomans*, 301 U. S. 441, 445, and is substantially similar to that followed in North Carolina, recently considered by this Court in *Currin* v. *Wallace*, No. 275, this term, decided January 30.

The growers after curing their tobacco sort it as best they can. In Florida and Georgia the leaves are not made into bundles or "hands", as is done in other areas, but are marketed loose. Growers usually transport the tobacco to the warehouse in private conveyances. The warehouse operator acts as agent for the seller and receives a fee for his

services (R. 60–61). At the warehouse the tobacco is placed in trays furnished by the warehouseman, and weighed under the supervision of warehouse employees; a ticket giving the name of the owner, and the number of pounds in the tray and providing space for the name of the buyer and the price paid is placed on each lot of tobacco. The warehouseman's employees then place the trays in rows with a passageway between the rows. No distinction is made between the tobacco produced in the state and tobacco produced in any other state, and tobacco which may be sold for transportation out of the state cannot be distinguished from any tobacco that may be destined for local manufacture (R. 60). The destination of the tobacco depends upon who buys it, and the buyer of any lot of tobacco cannot be foretold before the bidding is completed and the bid accepted (R. 60–62).

When the sale begins the auctioneer who conducts the sale, the warehouseman, and the warehouse employees proceed along one side of a row of trays and the buyers along the other side. Following the auctioneer on his side of the trays, usually 25 or 30 trays behind the sale, are calculators or "bookmen" who calculate the price a tray of tobacco brings, the amount due to the warehouseman, and the amount due to the grower (R. 60).

The sale proceeds with great rapidity. Lots of tobacco are sold as rapidly as 360 baskets per hour—one basket every 10 seconds. The sale is in constant motion. The auctioneer calls the bids and

offers so rapidly that his words can be understood only by the initiated. Bids are usually made by gestures known only to the auctioneer and the bidder. The warehouseman customarily makes the opening bid and sometimes acquires tobacco at the sale (R. 60).

When a sale is made a ticket marker places the buyer's name, the price, and the buyer's grade on the warehouse ticket. The bookmen following the sale make their calculations, described above, and unless the seller rejects the offer by folding the ticket on the tobacco and laying it back on the tray, the tobacco is promptly removed by the buyer from the warehouse floor,[22] commingled with other tobacco purchased by the buyer and shipped to whatever place the purchaser chooses for redrying, storage, and manufacture.[23] A grower who rejects the sale may, and usually does, subsequently reoffer his tobacco at the same or another warehouse. The warehouseman's employees calculate the gross value of each lot sold, and deduct the warehouseman's fee. The grower is paid the net proceeds and the warehousemen later collect the gross sale price from the buyer (R. 60, 61).

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[22] Tobacco bought by the warehouseman is not removed from the floor but usually is rearranged and put back in line for resale (R. 60).

[23] This must be done within a few minutes of the sale, and can only be done by a buyer present at the sale (R. 60).

E. INTERSTATE AND FOREIGN COMMERCE IN FLUE-CURED TOBACCO

A preponderant part of the flue-cured tobacco sold at auction warehouses is transported in interstate or foreign commerce promptly after sale. During the five-year period 1932–1936, an average of 55% of the flue-cured tobacco grown in the United States was exported (R. 64). At least two-thirds of the flue-cured tobacco sold at auction in the United States moves outside the state where it is first sold to be manufactured (R. 65).[34] The preponderantly interstate and foreign character of flue-cured tobacco sales at auction warehouses is most strikingly illustrated by the Georgia sales. Substantially all of the tobacco sold in Georgia is sold for shipment in interstate and foreign commerce. During the five-year period 1932–1936, Georgia marketings averaged almost 53 million pounds,

[34] Although the figure given for tobacco sold and shipped in interstate commerce is the most accurate available, it represents only a minimum, since it assumes that all tobacco manufactured in a state which grows tobacco was produced in that state (R. 65). It thus does not take account of interstate sales to factories in other tobacco growing states. That there are substantial quantities of tobacco so sold appears from the fact that many domestic manufacturers buy in Georgia and Florida, although their main factories are in North Carolina and Virginia (R. 61–62).

The figures on page 65 of the Record indicate that the statement on that page that approximately two-thirds of the flue-cured tobacco moves to other States refers to both interstate and foreign movements rather than to the interstate movement alone.

whereas an average of only 200 pounds per year was manufactured in Georgia. In other words, an amount less than four ten-thousandths of one per cent of the Georgia sales was manufactured in Georgia. All the rest was sold for manufacture outside the state. Although in other states in the flue-cured producing area the excess of the quantity sold over the quantity manufactured in the state is not as high as in Georgia, the tobacco manufactured in South Carolina and Florida is negligible, and that manufactured in North Carolina is less than 40 percent of the sales in the state. The poundage manufactured in Virginia is slightly less than 78 percent of the quantity sold in Virginia (R. 59, 65). (See note 24, *supra*, p. 28.)

The interstate character of the marketing of flue-cured tobacco is further emphasized by the fact that most of the tobacco is bought by a small number of buyers for use in factories scattered throughout the world (R. 61–62). In the United States tobacco is manufactured in nine hundred factories in forty-four States (R. 71). Since tobacco products are composed of blends of various domestic and foreign tobaccos, each of these factories receives tobacco from various States and countries (R. 64). The products of these factories are then distributed throughout the United States (R. 71). A large portion of the tobacco exported also moves in interstate commerce before shipment abroad, most of it clearing through Virginia ports and some from northern states (R. 67).

F. RELATIONSHIP BETWEEN INTERSTATE PRICES AND THE VOLUME SOLD AND SHIPPED IN INTERSTATE AND FOREIGN COMMERCE

The consumption of tobacco is relatively stable (R. 73). The amount marketed fluctuates widely from year to year (R. 73). There is a positive, readily apparent, interrelation between the amount marketed and the price received by growers (R. 73, 74, 78). Over a long period, before the Federal government gave assistance to growers in controlling the amount marketed, prices were consistently low when large crops came to market and relatively higher when crops were small relative to the demand (R. 73, 74, 78).

But equally significant is the fact that the quantity marketed in any year varied directly with the prices paid for the crop marketed the previous year. The prices paid for the crop in any year directly affected the amount which growers would market in succeeding years and, consequently, the price for which the buyers would be able to get tobacco in succeeding years (R. 73, 74). When prices were low in any year farmers brought to market in the succeeding year a smaller quantity of tobacco and the price in the succeeding year accordingly increased. Conversely, when the price had been high in any year farmers consistently brought to market greater amounts the next year

and had to sell them at lower prices.[25] Such increases in volume did not compensate, in terms of total income, for decreased prices (R. 82, 84).

These relationships result from the manner in which the tobacco industry is organized. About 300,000 families of growers produce and market the crop (R. 55, 74). Each grower conducts his production and marketing independently and in competition with other farmers growing the same class of tobacco (R. 74). They lack the detailed information available to the few buyers and have been unable, individually, to adapt their plans for production and marketing to meet requirements of the buyers (R. 74). Moreover, they have been unable to devise effective methods of coordinating their activities in either production or marketing so as to adjust the supply offered for sale to the effective demand.[26] Accordingly, influenced by individual hope of gain and by fear that, because they lacked effective methods of coordinated action, other growers would profit from prevail-

[25] With the exception of one year, 1922, when despite an increase of 1.3 per cent in supply over the previous year, the price did not decrease relative to the previous year but instead increased substantially. It is noteworthy, however, that despite the increase in the quantity marketed in 1922 the total supply in that year had fallen from 4 per cent over the reserve supply level in 1921 to 5 per cent below the reserve supply level (R. 78, 79).

[26] The private efforts of growers to adapt their marketings to market requirements have generally been unsuccessful (see pp. 24, 25, *supra*). Efforts of the states have also failed to meet the situation (R. 73, 90–92).

ing prices at their expense if they should attempt, as individuals, to limit their production or their marketing, they consistently planted and brought to market after each year of high prices, large crops which they found they could sell only at low prices, or part of which they could not sell at all (R. 73, 75, 79).[27]

When the actual supply exceeded the reserve supply level, prices to growers dropped especially low, and the purchasing power of the tobacco sold consistently fell below the parity price deemed by Congress to be a fair return to tobacco farmers (R. 75, 78). In such years of low prices the increase in the volume sold did not offset the low prices.

On the other hand, a few large buyers purchase substantially the entire crop by open competitive bidding at public auctions (R. 61, 62). They customarily have on hand large stocks of tobacco, adequate to meet their requirements for a considerable time,[28] even without their buying much of the crop

[27] The individual grower, even though it may mean a loss to him, usually sells all of his tobacco except that which will not bring a sufficient price to reimburse him for marketing charges and the cost of preparing it for market. Moreover, in some years buyers have refused to bid at all on large quantities of tobacco which ordinarily would have been marketed. Growers have customarily used such tobacco as fertilizer. This has been done widely in some years (R. 75), although production figures for tobacco, being based largely on marketing, fail to show the quantities thus withheld from market.

[28] In the case of the domestic manufacturers these stocks on hand when the markets open and before they acquire any

offered in any particular year. They are well informed before the markets open as to the quantity, not only of their own stocks but of those in the hands of manufacturers generally, and as to the size of the crop coming to market (R. 73). As marketing progresses they are able to keep informed as to the amounts being bought and the prices being paid by the other competing buyers. Moreover, they are fully aware of the fact that if any of the large buyers should bid the price to a high level in the current season, in the absence of effective control of marketing, growers will bring to market the next year a larger crop which buyers who have not overloaded their inventories at the high price can buy at lower prices. Any buyer of disproportionate quantities at high prices would be at a competitive disadvantage the succeeding year.

Each buyer was in a position as the marketing season progressed to hold down its bids and limit the quantity bought if it considered that prices were getting too high in view of prospective price and supply. Accordingly the amounts bought by each buyer and the prices paid were designed to prevent other large competitors from procuring an advantage through holding back on current pur-

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of the current crop normally amount to almost twice their annual requirements. The exporters retain smaller stocks adequate only to meet changes in foreign demand, but only because the foreign manufacturers to whom they sell have their own facilities for storing supplies abroad (R. 63, 64).

chases and replenishing their stocks at lower prices in the subsequent year. In this way the size of the crop which any particular level of current prices would bring to market the next year was a definite factor in determining the prices actually bid in the current year. See H. R. Report 1645, Appendix, p. 223, *infra*.

The reluctance of each buyer to acquire greater relative quantities of tobacco at higher prices than its competitors consistently depressed prices below the level which would have resulted from uninhibited bidding if the buyers had been unconcerned with these competitive hazards of bidding freely. Had growers been able to control the amounts they brought to market each year the markets would have been freed of this price-depressing factor. See H. R. Rep. 1645, Appendix, pp. 223, 224, *infra*. This is strikingly evident from the fact that after 1933, when buyers were reasonably assured that the crops brought to market would be held approximately in line with demand regardless of the prices paid, they raised prices by approximately 50 percent in the middle of the 1933 marketing season and have since continued to pay unprecedentedly high prices for relatively large crops (R. 53, 76–83).

Federal or state programs for assisting growers to regulate the quantity of tobacco marketed were in effect or in prospect each year from 1933 to 1938. For the three years 1935, 1936, and 1937, growers have sold, not small crops, but crops which have brought the total supply in each of those years well

above the reserve supply level (R. 79, 80). They have received for such crops not the low prices which they had been accustomed to receive for crops of that relative size, but prices generally as high as or higher than the prices previously received even in the few years when supplies were below the reserve supply level (R. 78–79). Without the prospect of governmental assistance which has been present every year since 1933, the certainty of excessive marketings in response to such prices would have resulted in much lower prices (R. 83).

Because the cost of tobacco is but a minor part of the cost of manufactured tobacco products (R. 73, 74, 84), and because manufacturers follow relatively fixed price policies there is little, if any, relationship between the prices received by farmers for their leaf tobacco and the prices paid by the consumer for manufactured tobacco products (R. 74; H. R. Report 1645, Appendix, pp. 223–224, *infra*). Thus, increases in prices and real income to farmers such as have resulted from effective control of the amount marketed do not serve to raise prices to the ultimate consumer (R. 74).

Depressed tobacco prices and severe annual fluctuations in prices and in the quantity marketed not only adversely affect the farmers who sell tobacco in interstate and foreign commerce but also result in severe disruption of such commerce itself. Notable instances of the latter were "the difficulties which culminated in the so-called night

eign sales of tobacco are minimized by the effective control of present and prospective marketings.

SUMMARY OF ARGUMENT

I. *The Commerce Clause.*—A. Most flue-cured tobacco is sold at auction markets for extrastate shipment. Such sales are interstate or foreign commerce and subject to Congressional regulation. The Agricultural Adjustment Act of 1938 regulates only *sales* of tobacco; it provides a mechanism for determining how much each grower may market, and "market" as used in the Act means "sell." To the extent that the Act is applied to interstate selling, it regulates interstate commerce itself, and clearly falls within the federal commerce power. (See pp. 45–54, *infra.*)

B. If the Act may validly be applied to sales of tobacco for interstate or foreign shipment, it may be applied also to sales to intrastate destinations. It is impossible physically to separate interstate and intrastate sales of tobacco. Often even after the sale has been completed the destination of the tobacco may not be known. All that is known is that in Georgia all but a minute quantity and in the nation over two-thirds of the total is being sold for immediate shipment in interstate and foreign commerce. Economically, as well as physically, interstate and intrastate sales of tobacco are intermingled. The quantity sold intrastate contributes to the total supply and affects the entire price structure as much as that which crosses state lines.

In view of this commingling of interstate and intrastate operations, the commerce power may be applied to the whole. (See pp. 54–59, *infra.*)

C. 1. (a) The Act does not regulate production. It authorizes the fixing of quotas for the amount to be sold, not the amount to be produced. In no way does it control the conduct of a grower prior to the marketing of his tobacco. That it was not intended to operate as a regulation of production appears from the fact that Congress contemplated that under certain conditions marketing quotas were to be established after the harvesting of the crop but before marketing. The purposes of the Act—stabilizing prices and marketings in commerce—are achieved by regulating the amount marketed rather than the amount grown. Moreover, a restriction upon marketing may not have the effect of limiting production. Tobacco (as well as the other crops for which quotas may be established under Title III) may be and customarily is stored for long periods of time. Growers acting cooperatively can readily arrange to have any tobacco produced in excess of marketing quotas kept for sale in years when no quotas are in effect or when quotas are not exceeded. (See pp. 59–67, *infra.*)

(b) Even if it were true that the fixing of marketing quotas necessarily affected production, it would not follow that production was being regulated. Marketing, production, and transportation are so interrelated that regulation of any one of them often will inevitably affect the others. And

yet this court has repeatedly recognized that such collateral effects do not determine the constitutionality of legislation. If that were not the case, many unquestionably valid statutes, such as the tariff, petroleum and liquor laws, and the Lottery, White Slave, and Kidnapping Acts, might have fallen by the wayside. (See pp. 67–73, *infra*.)

2. (a) In the same way the purpose of a regulation of interstate commerce cannot affect its validity. The Constitution nowhere provides that the power of Congress to regulate commerce may be exercised only for a commerce purpose. In the interstate field Congress may act for the public benefit just as may the States in the regulation of their internal commerce. From the earliest decisions and the *Commentaries* of Mr. Justice Story to the latest pronouncements of this Court, these principles have been recognized. (See pp. 73–85, *infra*.)

(b) Nevertheless, the Act would be valid even if the most orthodox commerce purpose were requisite. The objectives sought by Congress are the stabilizing of prices so as to prevent the unreasonably low prices to farmers and the disorderly marketing in commerce which results from surpluses in years of excessive yield and shortages in lean years. The prevention of such evils is much more closely related to the underlying objectives of the commerce clause than protection of the public against immorality, crime, and disease. Most important legislation enacted under the commerce

clause has had a similar objective—the promotion of the economic interest of particular classes of the public. This has been most frequently sought to be achieved through regulation designed to influence prices, such as the tariff, the Sherman Act, the Packers and Stockyards Act, the Grain Futures Act, and the Tobacco Inspection Act. The objective of the Agricultural Adjustment Act of 1938 is fundamentall ythe same. (See pp. 89–96, *infra*.)

3. Even though the Act be regarded as a direct regulation of the amount of tobacco produced, it would not for that reason fall without the commerce power. Congress may regulate intrastate transactions which directly affect interstate commerce, even though they are incidents of production. Here the quantity of tobacco produced has a most direct and substantial effect both upon interstate prices and the amount shipped in interstate commerce. Intrastate acts have frequently been held to fall within the commerce power because of their effect upon interstate supply and prices in interstate markets. (See pp. 96–109, *infra*.)

4. The cases relied upon by the appellants are not controlling in this case. *United States* v. *Butler*, 297 U. S. 1, held the provisions of the Agricultural Adjustment Act of 1933 involved in that case to be a regulation of production rather than an exercise of the power to tax and provide for the general welfare. Such provisions did not purport to regulate interstate and foreign commerce. The

present Act is concerned only with interstate marketing, and thus, does not regulate the subject found in the *Butler* case to be beyond the scope of federal power. Moreover, even if it were a regulation of production it would, nevertheless, come within the commerce power because of the direct effect of the activity regulated upon interstate and foreign commerce. (See pp. 109–111, *infra*.)

Hammer v. *Dagenhart*, 247 U. S. 251, is also distinguishable. But the reasons advanced by the majority in that case are inconsistent with subsequent decisions of this Court. We believe that the principles which governed the decision in that case have been abandoned by this Court and that the case is no longer an authority. (See pp. 112–118, *infra*.)

II. *The Tenth Amendment.*—Since the marketing quota provisions of the Act are an exercise of the power of Congress to regulate interstate and foreign commerce, they cannot violate the Tenth Amendment. That Amendment provides only that "the powers not delegated to the United States * * * are reserved to the States." Language could not indicate more plainly that the Amendment does not limit the powers which are delegated to the United States. The history of the adoption of the Amendment, the statements of early judges and commentators and numerous decisions of this Court demonstrate that the Amendment means only what it says. We do not believe that implications in a few relatively re-

cent opinions can be said to have discarded *sub silentio* such a basic constitutional doctrine. (See pp. 120–138, *infra*.)

III. *The Due Process Clause.*—A. Appellants contend that the Act is invalid for indefiniteness because farmers cannot tell from the statute itself what their quotas are to be. Inasmuch as the Act does not penalize farmers for marketing tobacco in violation of the general statutory standards, but only for marketing quantities in excess of specific quotas administratively determined under such standards, this objection is untenable. (See pp. 138–141, *infra*.)

B. Appellants contend that the establishment of quotas for 1938 was retroactive and violated due process of law because the 1938 crop was planted, grown, and harvested before the allotments to individual farms were made. But the Act imposes penalties only for excessive amounts marketed after individual quotas are prescribed, not for the amount produced before that time. Thus it does not operate retroactively. The fact that appellants may have expended considerable sums in raising their crop before the marketing quotas were fixed (although after they were aware that quotas were likely to be established) is not material. Many decisions have held that statutes operating prospectively are not invalidated because of losses which may result from expenses previously incurred. (See pp. 141–152, *infra*.)

C. The ends which Congress was seeking to attain in the Act were the maintenance of a balanced

supply of farm products marketed in interstate and foreign commerce and the protection of farmers against unreasonably low prices. These ends are legitimate under the commerce clause, and the provisions of the Act are reasonably adapted to achieve them. Accordingly, the statute satisfies the requirements of due process of law. The plight of American agriculture because of decreased exports, the accumulation of surpluses, and the resultant low prices has presented a serious national problem since the 1920's. The present Act reasonably seeks to meet this situation by keeping unwieldy surpluses off the market. In the absence of affirmative disproof the finding by Congress that the means adopted are reasonable and appropriate must be accepted by the Court. Here the record confirms the legislative judgment. (See pp. 152–160, *infra*.)

IV. *Delegation of Power.*—The provisions of the Act which determine when a national marketing quota is to be established, what the amount of the quota is to be, and how it is to be apportioned among the States, merely require the Secretary to make findings of fact from official statistics (subject to minor adjustments). Section 312 (a), 313 (a). In the main these determinations are purely mathematical. The narrow and well-defined latitude permitted to administrative discretion in making definitely prescribed adjustments is plainly unobjectionable. (See pp. 160–166, *infra*.)

The Act carefully enumerates the specific factors to be considered in apportioning the state quotas to

individual farms. Section 313 (b). Although the administrative officials are called upon to exercise judgment in determining how much weight shall be given to each factor, Congress has definitely established an intelligible policy and prescribed adequate standards to guide administrative discretion. In many prior cases this Court has upheld statutes containing delegations of authority far more sweeping and less circumscribed than any in the case at bar. (See pp. 166–175, *infra.*)

ARGUMENT

I

THE MARKETING QUOTA PROVISIONS OF THE AGRICULTURAL ADJUSTMENT ACT ARE VALID REGULATIONS OF INTERSTATE AND FOREIGN COMMERCE

A. THE MARKETING QUOTA PROVISIONS ARE REGULATIONS OF INTERSTATE AND FOREIGN COMMERCE

The question of federal power in this case is fundamentally the same and just as simple as that before this Court in *Currin* v. *Wallace,* No. 275. The master facts, the same in both cases, may be briefly summarized. Most tobacco is sold at auction warehouse markets (R. 56). Substantial quantities of the tobacco brought to the warehouses comes from outside the state (R. 57–58).[*] At least

[*] That is true as to some of the appellants, whose farms are in Florida, but not as to those appellants whose farms are in Georgia (R. 44). In *Currin* v. *Wallace* approximately 15 per cent of the tobacco sold on the Oxford, North Carolina, market came from Virginia. The amount coming to a market from outside the state probably varies with the distance of the market from a state line.

two-thirds [30] of all flue-cured tobacco sold at auction warehouses is sold for immediate shipment to an interstate or foreign destination, 55 percent being exported (R. 64–65). In Georgia 99.9996 percent of the flue-cured tobacco so sold—52,807,600 out of 52,807,800 pounds—is purchased by extra-state purchasers (R. 59).

In markets where tobacco is sold to both interstate and intrastate purchasers, no one can know when the grower places his tobacco on the warehouse floor for sale whether it is destined for interstate or intrastate commerce (R. 60). Thus, any regulation of the sale of tobacco for interstate commerce must apply also to sales in intrastate commerce if it is to be effective.

As this Court declared in the *Currin* case, sales of tobacco by growers through warehousemen [31] to purchasers taking the tobacco outside the state *are* interstate commerce. The word "commerce" does not refer merely to transportation; its primary connotation at the time the Constitution was adopted and thereafter was "exchange of goods." [32]

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[30] See note 24, p. 28, *supra*.

[31] The same would be true of any sales by growers, on the farm or elsewhere, to purchasers for interstate shipment. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222.

[32] In his concurring opinion in *Gibbons* v. *Ogden*, 9 Wheat. 1, 229–230, Mr. Justice Johnson defined the word "commerce" as follows:

"Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor,

This Court has pointed out repeatedly that interstate commerce consists of buying and selling as well as of transportation. "Such commerce is not confined to transportation from one State to another, * * *. Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation." *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 290. *Currin* v. *Wallace, supra*. *Shafer* v. *Farmers Grain Co.*,

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transportation, intelligence, care and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation."

The opinion of Chief Justice Marshall, in the same case, indicates that counsel for appellee admitted that "commerce" included "buying and selling or the interchange of commodities" but denied that it comprehended navigation. To this argument he replied (9 Wheat., at 189):

"This would restrict a general term, applicable to many objects, to one of its significations."

The *American Encyclopedia*, published in 1798, contained the following definition: "Commerce—is an operation by which the wealth or work either of individuals or of society may be exchanged by a set of men called merchants for an equivalent * * *." *Webster's Dictionary*, as late as 1841, contained the following definition: "Commerce—in a general sense, an interchange or mutual change of goods, wares, productions, or property of any kind by the nations or individuals, either by barter, or by purchase and sale; trade, traffick." See also *Webster's Dictionary* (1st ed. 1806); *Samuel Johnson's Dictionary* (6th ed. 1785); *Perry's Royal Standard Dictionary* (4th Am. ed. 1796); *Alexander's Columbia Dictionary* (1800).

268 U. S. 189, 198. In his dissenting opinion[25] in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 326, Mr. Justice Cardozo declared with respect to sales of coal by mine operators, f. o. b. mine, for interstate shipment "that sales made under such conditions constitute interstate commerce, and do not merely 'affect' it." See also, the opinion of the Chief Justice in the *Carter* case at page 320; and *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Swift & Co.* v. *United States*, 196 U. S. 375, 398; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222, 225; *Stafford* v. *Wallace*, 258 U. S. 495, 519; *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10; *Globe Elevator Co.* v. *Andrew*, 144 Fed. 871; *Krueger* v. *Acme Fruit Co.*, 75 F. (2d) 67, 68 (C. C. A. 5th).

"So far as the sales are for shipment to other States or to foreign countries, it is idle to contend that they are not sales in interstate or foreign commerce and subject to congressional regulation." *Currin* v. *Wallace, supra.* State power to regulate them has been denied only because of the existence of the superior federal power. In *Lemke* v. *Farmers Grain Co., supra,* which dealt with sales of grain by farmers to buyers transporting it to terminal markets in other states—a method of doing business

[25] The references in this brief to the dissenting opinions of the Chief Justice and of Mr. Justice Cardozo in the *Carter* case will (unless otherwise noted) be to those portions of the opinions upholding the power of Congress to fix prices, a question upon which the majority of the Court did not find it necessary to pass.

strikingly similar to that here under consideration—the Court held that the states were powerless to regulate such sales because the power to control them was vested in the Congress. The Court stated (258 U. S., at 60–61):

> It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control.

The principles applied by these decisions to sales of grain at country elevators for interstate shipment are clearly applicable as well to sales of tobacco at the warehouses for interstate shipment. *Currin v. Wallace, supra.* Thus, the sale of tobacco at the warehouse when the buyer immediately thereafter transports the tobacco out of the State is itself interstate or foreign commerce and subject to Federal regulation.

The tobacco marketing quota provisions of the Agricultural Adjustment Act of 1938 regulate only *sales* of tobacco. The Act prescribes a mechanism by which the amount to be *marketed* by each grower

rider activity in the tobacco areas of Kentucky and Tennessee; the wide-spread closing of tobacco markets for varying periods of time, which followed the drastic decline of tobacco prices after the World War; and the similar closing of auction markets because of low prices during the early part of the 1933 tobacco marketing season" (H. R. Report 1645, Appendix, p. 227). The most acute disturbance of commerce in tobacco was that which occurred in 1933.

Between 1927 and 1933 excessive supplies accumulated and prices declined progressively. When the 1933 marketing season opened, prices were even lower than in 1932 (R. 78). Protests from the growers first arose in Georgia, where the markets first opened, "and then spread to South Carolina and North Carolina. Appeals were made to the Agricultural Adjustment Administration for relief. Mass meetings of growers were held throughout the flue-cured tobacco belt and, pending some action by the Federal Government, the auction markets in South Carolina and North Carolina were closed by official action of the respective governors of these two states. The marketing in Georgia had been completed and selling in Virginia had not yet commenced, so that the flue-cured tobacco industry was at a complete standstill. Conferences were held among the growers, the buyers, and officials of the Agricultural Adjustment Administration in Washington, D. C., and elsewhere.

There was an insistent demand that immediate action be taken by the Federal Government to save the remainder of the 1933 flue-cured tobacco crop from being sacrificed at the prices prevailing at the time of the closing of the markets. As a result, a marketing agreement was entered into between the principal buyers of flue-cured tobacco and the Secretary of Agriculture pursuant to the provisions of Section 8 (a) of the Agricultural Adjustment Act of 1933 * * *" (R. 73).

This agreement raised the prices from a level lower than the average price of 11.6 cents (received for the 1932 crop) to a minimum of 17 cents (R. 78). During the period since 1933 "prices were influenced by the operation and prospective operation of governmental programs regulating the production or marketing of tobacco" (R. 78). They have since remained at levels favorable to the growers and no further similar disruptions in commerce in tobacco have occurred.

The previous federal programs sought to assist farmers through adjustment of the quantity produced. This Act seeks to aid them by limiting merely the amount offered for sale, irrespective of what the production may have been or may be, and does this only in years when the supply exceeds the reserve supply level. It is apparent from the facts summarized above that the influences which have disrupted the marketing of tobacco and depressed prices in interstate and for-

> in itself, a limitation. Power to regulate, it is said, cannot be understood to give a power to annihilate. To this it may be replied, that the acts under consideration, though of very ample extent, do not operate as a prohibition of all foreign commerce. It will be admitted that partial prohibitions are authorized by the expression; and how shall the degree, or extent, of the prohibition be adjusted, but by the discretion of the national government, to whom the subject appears to be committed?

Allotments of the amount of a commodity which a person may ship in interstate commerce have been upheld with respect to petroleum (*Griswold* v. *The President of the United States*, 82 F. (2d) 922 (C. C. A. 5th))[38] and coal (*Assigned Car Cases*, 274 U. S. 564; *Avent* v. *United States*, 266 U. S. 127).[39] The lower federal courts have with one exception [40] upheld the validity of marketing quotas established for fruits and vegetables under the

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[38] The Connally "Hot Oil" Act (49 Stat. 30, U. S. C. Title 15, § 715) prohibits the shipment in interstate and foreign commerce of oil produced in excess of that allowed by state law. No one has seen fit to carry the question of the constitutionality of the Act to this Court.

[39] The allotment of railroad cars to coal mines in time of car shortage was in substance a determination of the amount of coal each mine could ship in commerce.

[40] The only unreversed District Court case holding such orders invalid is *Chester C. Fosgate Co.* v. *Kirkland*, 19 F. Supp. 152 (S. D. Fla.), which in effect has been overruled by the decision of the Circuit Court of Appeals for the Fifth Circuit in *Whittenburg* v. *United States*, 100 F. (2d) 520.

Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended in 1935 (49 Stat. 750), and later reenacted as the Agriculture Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. § 601). *Edwards* v. *United States*, 91 F. (2d) 767 (C. C. A. 9th); *Wallace* v. *Hudson-Duncan & Co.*, 98 F. (2d) 985 (C. C. A. 9th); *Whittenburg* v. *United States*, 100 F. (2d) 520 (C. C. A. 5th); *United States* v. *Goldsmith Fruit Co.*, 19 F. Supp. 147 (S. D. Fla.). Cf. *United States* v. *David Buttrick Co.*, 91 F. (2d) 66 (C. C. A. 1st), certiorari denied 302 U. S. 737; *United States* v. *Whiting Milk Co.*, 21 F. Supp. 321 (D. Mass.).[41] In numerous antitrust cases this Court has recognized that the supply of a commodity in interstate commerce was a proper concern of Congress under the commerce power. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 169.

For these reasons we believe that the statement that the commerce question in this case is fundamentally a simple one is amply justified. The Agri-

[41] In the following unreported cases district courts have granted temporary restraining orders or preliminary injunctions enforcing orders of the Secretary of Agriculture of the kind referred to: *United States* v. *Babcock Dairy Co. et al.* (N. D. Ohio); *United States* v. *Herman M. Sheffield et al.* (S. D. Texas); *United States* v. *Melvin Child Andrews et al.* (D. Mass.). See also *United States* v. *Corinth Creamery, Inc.*, 21 F. Supp. 265 (D. Vt.).

cultural Adjustment Act of 1938 in establishing marketing quotas, does no more than limit the amount which may be sold and shipped in commerce. The commerce so regulated is substantially all interstate or foreign commerce. Accordingly, the Act is a regulation of interstate and foreign commerce.

B. THE ACT IS VALID AS APPLIED TO INTRASTATE SALES OF TOBACCO

If the Agricultural Adjustment Act of 1938 may validly be applied to sales of tobacco for interstate shipment, it may be applied also to sales to intrastate destinations. This must necessarily be the case when interstate and intrastate transactions are both physically and economically inseparable, as they are here. The question here, too, is the same as that before the Court in *Currin* v. *Wallace, supra.*

A brief description of the course of trade will demonstrate that commerce in tobacco is not susceptible of division into interstate and intrastate fractions. Most tobacco, as has been indicated, *supra,* p. 23, and all of that involved in this case, is sold on auction markets. Tobacco comes to many of these markets, including the Valdosta market, from growers outside as well as from growers within the state in which the market is located (See p. 45, *supra*). At each market representatives of the buyers compete with each other for the various lots sold (R. 60). Although most of the buyers pur-

chase for interstate shipment, some may purchase for shipment to factories within the state (R. 65). Most purchases are made by representatives of a few major companies, some of which have factories in several states (R. 61, 62). Such purchasers may buy both for interstate and intrastate shipment. Since tobacco products are generally composed of blends of various types of tobacco, both foreign and domestic (R. 64), factories located in producing states necessarily receive large quantities of tobacco from outside sources. Most of that portion of the tobacco crop which is processed in factories within the state in which it is grown ultimately moves into interstate commerce, since the products of these factories are distributed generally throughout the United States.[42] (R. 71).

The commerce thus described does not admit of physical division into separate interstate and intrastate streams. The regulation here in question takes effect at the time of marketing, which in the vast majority of instances means at the time of sale on the warehouse floor. When the tobacco is offered for sale and while the auction is proceeding, no one can tell which tobacco is destined for interstate and which for intrastate shipment. (R. 60-61). Insofar as purchases by the large buyers,

[42] The processing consists in the main of drying, shredding, and blending. The tobacco remains tobacco; it is not changed into a substantially different product as are the raw materials going into manufacturing plants in other industries.

who take a major proportion of the total crop (R. 62), are concerned, even after the sale is completed and the identity of the purchaser determinable the destination of the tobacco may not be known (R. 61). All that is known is that in Georgia all but a minute quantity and in the nation over two-thirds of the total is being sold for immediate shipment in interstate and foreign commerce, and that most of the remainder will eventually move in such commerce. (See pp. 45–46, *supra.*)

Economically as well as physically intrastate and interstate sales of tobacco are inextricably intermingled. This fact also makes control of intrastate marketing essential in view of the fact that the Act is designed to insure orderly marketing and a fair and stable price (see pages 86–87, *infra*). The quantity sold intrastate contributes to the total supply and affects the entire price structure as much as that which crosses state lines. An excess amount purchased intrastate and there stored will decrease both the price and the demand for new-grown tobacco in subsequent years just as much as if it were purchased in interstate commerce, and will thus contribute to the disorderly marketing in such commerce which the statute was designed to avert.

What is not segregated in fact need not be segregated in law. The Constitution does not require separation of the inseparable. Marketing transactions relating alike to the interstate and intrastate movement of commodities may be regulated

as to all when the small intrastate part is commingled with the dominant interstate part. *Currin* v. *Wallace, supra. The Shreveport Case,* 234 U. S. 342; *The Minnesota Rate Cases,* 230 U. S. 352; *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.,* 257 U. S. 563; *Virginian Ry. Co.* v. *System Federation No. 40,* 84 F. (2d) 641, 647–651, affirmed, 300 U. S. 515. Cf. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453."

In the *Currin* case this Court applied these principles to sales on the tobacco markets, saying:

> The fact that intrastate and interstate transactions are commingled on the tobacco market does not frustrate or restrict the congressional power to protect and control what is committed to its own care. * * * Here, the transactions on the tobacco market were conducted indiscriminately at virtually the same time, and in a manner which made it necessary, if the congressional rule were to be applied, to make it govern all the tobacco thus offered for sale.

These principles are most appropriately applied to the regulation of marketing in an industry

"The "commingling of interstate and intrastate operations" (*The Minnesota Rate Cases,* 230 U. S., at 399) referred to in the above cases may be economic as well as physical. In the railroad rate cases it was the competitive interrelationship which caused the Court to regard interstate and intrastate rates as commingled. See *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 328–329 (dissenting opinion of Mr. Justice Cardozo).

which, in the language of the statute (Section 311 (a)) has "ramifying activities which directly affect interstate and foreign commerce at every point." Even if the marketing of tobacco by the growers were not itself in the interstate stream, it would be so close to interstate commerce as to subject it to federal regulation as an intrinsic part of the nation-wide current of commerce in tobacco. What has been said in upholding the regulation of *intrastate* transactions on the stockyards and futures markets may also be said as to the tobacco auction markets. Cf. *Stafford* v. *Wallace*, 258 U. S. 495, 515–519; *Swift & Co.* v. *United States*, 196 U. S. 375, 398; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 34. The language of this Court in *Stafford* v. *Wallace* is peculiarly appropriate here (pp. 518–519):

> The application of the commerce clause of the Constitution in the Swift Case was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another which are ever flowing are in their very essence the commerce among the states and with foreign nations which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect of such a stream and take it out of complete national regulation

by a nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part.

C. THE MARKETING QUOTA PROVISIONS OF THE ACT ARE NOT INVALID AS A REGULATION OF PRODUCTION

Appellants seek to evade the force of the decisions cited above demonstrating that the Act is a valid regulation of interstate commerce by the contention that it is really a regulation of production rather than commerce. For that reason they assert that it is not within the commerce power and in addition that it violates the Tenth Amendment. It is argued that the purpose and necessary effect of the Act are to control the production of tobacco on the farm, and that a regulation of that kind is beyond the power of Congress. To this we make answer:

(1) That the Act is not a regulation of production and the fact that it may affect production does not render it unconstitutional (pp. 60–73, *infra*).

(2) That the purpose of a regulation of commerce is immaterial, but that if purpose be relevant, this Act has a valid commerce purpose (pp. 73–96, *infra*).

(3) That even if the Act were to be regarded as a regulation of production, it is nonetheless valid in view of the direct effect of the transactions regulated upon interstate commerce (pp. 96–109, *infra*).

(4) That *United States* v. *Butler*, *Hammer* v. *Dagenhart*, and other cases cited by appellants are not controlling (pp. 109–118, *infra*).

We shall furthermore demonstrate in Point II, *infra*, pages 120–138, that the Tenth Amendment has no independent application, since it merely reserves to the states the power not delegated to Congress.

1. *The Act is not a regulation of production and the fact that it may affect production does not render it unconstitutional*

(a) THE ACT IS NOT A REGULATION OF PRODUCTION

The Act regulates marketing, not production. It authorizes the setting of quotas for the amount to be marketed or sold, not the amount to be produced. It imposes no penalties on a grower because of the amount he produces nor does it attempt to control any of his conduct prior to the act of marketing.

If the fact that the Act does not regulate production were not enough to demonstrate that it is not a regulation of production, consideration of other pertinent provisions of the Act, of its purposes and objectives, and of the manner in which it operates would lead to the same conclusion.

(1) Internal evidence in the statute of intention to regulate marketing rather than production may be found in the fact that Congress contemplated that some tobacco marketing quotas might become effective after the planting and growth of the crop. This appears plainly from Section 312 (b), which

provides with respect to burley and fire-cured and dark air-cured tobacco that, if the total supply exceeds the reserve supply level by more than five per cent, a national marketing quota shall become effective for the period from the date of the Secretary's proclamation to the end of the marketing year *then current* as well as for the succeeding marketing year. The marketing year for burley, and for fire-cured and dark air-cured tobacco runs from October 1 to September 30 (Sec. 301 (b) (7)). The year's crop is harvested by September, but the markets do not open until around December 1. The Secretary's proclamation is to be made by December 1 (Sec. 312 (a)) . Since these quotas provided for by Section 312 (b) apply to tobacco harvested more than two months before they become effective they could not possibly have been intended to limit production.

The quotas for flue-cured tobacco for the marketing year 1938–1939 present a similar situation. The Act was approved February 16, 1938. Under Section 312 (d) the Secretary was required to proclaim the amount of the national marketing quota for the year 1938–1939 within fifteen days and the result of the farmers' referendum within forty-five days of the enactment of the statute. The establishment of State and farm quotas provided for in Section 313 was to take place after the holding of the referendum, and obviously would take considerable time. Flue-cured tobacco is planted

in seedbeds between December and March, transplanted in April, May, and early June, and harvested in the more southerly producing states in June and early July (R. 50–51). Marketing in these states begins in late July or early August (*ibid.*). It is apparent from these facts that Congress must have realized that the quota provisions for flue-cured tobacco for 1938 would become operative in time to control the amount marketed but not in time to control the amount produced.

(3) The Act is designed to raise or stabilize prices. It achieves that result by controlling the amount marketed rather than the amount grown. With demand relatively constant, the price of tobacco is determined by supply—present and prospective (see pp. 30–37, *supra*, and pp. 100–103, *infra*). But the supply that primarily affects the price is that which may be marketed, not that which is grown but immobilized. Thus, in providing for the establishment of quotas limiting marketing alone regardless of production Congress went as far as was necessary for the accomplishment of the desired ends.

The purpose of stabilizing commerce through providing an orderly, adequate, and balanced flow of commodities in lean years as well as in good is likewise accomplished by controlling marketing rather than production. Natural factors—drought, flood, soil conditions—as well as the amount planted and the care taken of the crop de-

termine the amount produced in each year.* An even flow of commerce at reasonable prices can be achieved without regulating production by keeping surpluses in fat years from being marketed until years of shortage. This is what the Act contemplates, not limitation of production. The report of the Committee on Agriculture of the House of Representatives (H. R. Rep. 1645, 75th Cong., 2nd Sess.) makes this clear. It states that legislation to meet the farm problem (Appendix, pp. 206–207): "should not be posited on an economy of scarcity. Nor should such legislation be designed to meet a temporary emergency. It should, on the contrary, encourage the abundant production of agricultural commodities, and provide for the storage or warehousing of the production above current needs in order to have such commodities available at reasonable prices in years of drought or other adverse conditions. Such legislation should, by means of loans, assist farmers to cooperate with government in reaching this desirable objective." The report proceeds to state that "loans on agricultural commodities" are provided "in order to enable farmers to finance the storage and warehousing of commodities in years of excessive yields so that surpluses may be kept off the market, and so that in years of drought or other adverse conditions, supplies of agricultural commodities will be plenti-

* At the time of planting a farmer cannot tell precisely how many pounds of tobacco will be grown. This will vary with the weather and other natural factors.

is to be determined. The term "market" is defined in the Act to mean "to dispose of by sale, barter, or exchange." Section 301 (b) (6) (A).[34]

Tobacco is not commonly bartered or exchanged except for money and there is no suggestion that appellants do not market their tobacco by selling it.

The provisions of the Act authorizing the Secretary of Agriculture to establish marketing quotas for each farm thus mean only that he may establish sales quotas, that he may determine the amount which each grower may sell. To the extent that this determination relates to interstate selling—and substantially all appellants' sales are interstate (see pp. 28–29, *supra*)—it regulates the amount of tobacco which can be sold in interstate commerce. Such a regulation is unquestionably a regulation of commerce among the states. It is not even subject to the attack made on the Tobacco Inspection Act that the inspection there called for preceded interstate commerce and was for that reason beyond the federal power. A regulation of the amount sold regulates nothing that precedes or fol-

[34] Section 301 (b) (6) contains *inter alia* the following definitions:

"(A) 'Market,' in the case of cotton, wheat, and tobacco means to dispose of by sale, barter, or exchange, but, in the case of wheat, does not include disposing of wheat as premium to the Federal Crop Insurance Corporation under Title V.

"(D) 'Marketed,' 'Marketing,' and 'for market' shall have corresponding meanings to the term 'market' in the connection in which they are used."

lows interstate commerce; it regulates only such commerce itself."

That a regulation of the quantity of interstate commerce is a regulation of such commerce would seem to be plain upon its face. Absolute prohibitions of shipments of particular commodities have frequently been upheld. See *United States* v. *Carolene Products Co.*, 304 U. S. 144, 147, and cases cited therein. If such complete prohibitions are commerce regulations, a partial prohibition—which is what the quota system amounts to—must also be within the commerce power. This was conceded in *United States* v. *The Brigantine William*, Fed. Cas. No. 16,700, 28 Fed. Cas. 614 (1808), perhaps the earliest reported case under the commerce clause, where the embargo on foreign commerce was upheld as constitutional.[36] Judge Davis[37] declared (at page 621):

> * * * Stress has been laid, in the argument, on the word "regulate", as implying,

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[35] That the regulation is, under familiar doctrine, valid as to intrastate sales, if valid as to interstate, is shown below, *infra*, p. 54.

[36] The Supreme Court approved this decision (although without referring to it by name) in *Gibbons* v. *Ogden*, 9 Wheat. 1, at 192–193.

[37] Judge Davis stated that he was giving his impressions "coeval, in mind, with the constitution" (p. 623). Judge Davis was the youngest member of the Massachusetts convention called to ratify the Constitution. *National Cyclopedia of American Biography*, Vol. XXII, p. 349; *Dictionary of American Biography*, Vol. V, p. 132. The case is discussed in Warren, *The Supreme Court in United States History*, Vol. I, pp. 341–350.

(4) The fact that the quotas to be allotted to states and individual growers are apportioned on the basis of factors relating primarily to the amount which can be produced does not mean that the statute is a regulation of production.[46] Some fair formula had to be devised which would give each state and grower an equitable share of the allotment to be marketed. The formula adopted should conform as closely as possible to the marketing ability of the state or grower. Plainly, factors showing the amount which could be and had been produced on the farm are the fairest and best indicia of its marketing ability. Acceptance of the argument that the use of such a standard for marketing quotas makes such quotas invalid would result in the absence of any feasible and reasonable basis for the establishment of this method of regulating interstate marketing under the commerce power.[47]

A striking similarity may be noted between the basis for fixing farm marketing quotas set forth in Section 313 (b) of the Agricultural Adjustment

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[46] Tobacco quotas for individual farms are to be based first on past marketings, not past production (Sec. 313 (b)).

[47] The numerous cases holding that taxes on subjects within the power of the taxing authorities may be *measured* by matters not within that power are analogous. Cf. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Pacific Co.* v. *Johnson*, 285 U. S. 480; *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Van Allen* v. *Assessors*, 3 Wall. 573; *Peoples National Bank* v. *Board of Equalization*, 260 U. S. 702; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103; *Manhattan Company* v. *Blake*, 148 U. S. 412; *Educational Films Corp.* v. *Ward*, 282 U. S. 379.

Act of 1938 and the rule adopted by the Interstate Commerce Commission under the Transportation Act of 1920 for the establishment of base ratings for mines as a basis for the allotment of coal cars to the various mines. After an extensive investigation culminating in its decision in *In Re Rules Governing Ratings of Coal Mines,* 95 I. C. C. 309, the Commission determined that it should be the duty of the agencies rating the respective mines to take into consideration the following basic principles: "(a) physical conditions, (b) past performance, (c) labor supply, (d) other factors that may affect the production and shipment of coal" (95 I. C. C., at 323). These factors to be used in determining how much coal may be transported from each mine all relate primarily to the capacity of the mine to produce coal—just as some of the factors used in determining how much tobacco may be marketed from each farm relate to the producing capacity of the farm. Yet in the one case no more than in the other can it be said that consideration of such factors converts the regulation of transportation or marketing into one of production. See *Assigned Car Cases,* 274 U. S. 564, 575.

(b) THE FACT THAT THE REGULATION OF MARKETING QUOTAS MAY AFFECT PRODUCTION DOES NOT MAKE THE ACT A REGULATION OF PRODUCTION

It may be that the fixing of marketing quotas would in some years tend to reduce the amount produced as well as the amount marketed. Some farmers may

decrease the quantity they grow rather than produce intentionally in excess of quotas for storage and later sale. But the fact that a regulation of marketing may have such a collateral effect upon production does not make it a regulation of production. Congress has power to regulate interstate commerce. If a law regulates such commerce, it is within the power of Congress, regardless of what effect upon other matters it may have.

If the test of constitutionality were the existence of such collateral effects, many unquestionably valid laws would fall by the wayside. Distribution or marketing, transportation, and production are so interrelated that regulation of any one of them may, and often inevitably will, affect the others. Thus, if any one of these activities be prohibited with respect to any commodity, the others may instantaneously be interrupted. If transportation rates from a particular region are raised unduly, the amount produced and distributed from that region may well decrease. Cf. *Anchor Coal Co.* v. *United States,* 25 F. (2d) 462,[49] describing the Lake Cargo coal controversy. Destruction of a monopoly in distribution may inevitably break up a monopoly in manufacture as well. Cf. *Standard Oil Co.* v. *United States,* 221 U. S. 1.

[49] Reversed on grounds of mootness, 279 U. S. 812.

A state may prorate the *production* of oil without conflict with the commerce power, although the necessary and inevitable effect of the limitation of production upon the amount of oil shipped in interstate commerce cannot be gainsaid. *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210. Conversely, Congress may limit the amount of oil distributed in interstate commerce, with an equally inevitable effect upon production, without thereby invading the field of state sovereignty. *Griswold* v. *The President of the United States,* 82 F. (2d) 922. A state may prohibit the manufacture of liquor and thus completely shut off the flow of interstate commerce in that commodity from within its borders. *Kidd* v. *Pearson,* 128 U. S. 1. Congress, on the other hand, by prohibiting the shipment of intoxicating liquor or of prison-made goods to states whose laws prohibit their manufacture and sale inevitably discourages and restricts manufacture. Cf. *Clark Distilling Co.* v. *West'n Md. Ry. Co.,* 242 U. S. 311; *United States* v. *Hill,* 248 U. S. 420; *Kentucky Whip and Collar* v. *Illinois Central Railroad,* 299 U. S. 344.

The protective tariff directly (and designedly) affects the amount of goods manufactured domestically; yet it is not a regulation of manufacture. The lottery act directly (and designedly) discourages lotteries. The Federal Kidnaping Act, it is sincerely to be hoped, discourages not only the interstate transportation of kidnaped persons but

kidnaping itself—although kidnaping *per se* is no concern of the federal government. "Such regulation is not a forbidden invasion of state power *either because its motive or its consequence* is to restrict the use of articles of commerce within the states of destination, and is not prohibited unless by the due process clause of the Fifth Amendment. And it is no objection to the exertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 147; *Currin* v. *Wallace, supra.*

As the majority of the Court (and *a fortiori* the minority) recognized in *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 371, in treating an argument similar to that made by appellants here:

> The collateral fact that such a law may produce contentment among employees,—an object which as a separate and independent matter is wholly beyond the power of Congress,—would not, of course, render the legislation unconstitutional.

The argument that an exercise of federal power may be invalid because of its regulatory or deterrent effect outside the sphere of federal regulation has repeatedly been rejected in cases involving the validity of taxes which were obviously designed to discourage the activity taxed. See particularly,

Veazie Bank v. *Fenno*, 8 Wall 533, 548;[50] *McCray* v. *United States*, 195, U. S. 27, 60;[51] *Sonzinsky* v. *United States*, 300 U. S. 506. Cf. *Magnano* v. *Hamilton*, 292 U. S. 40. In the *Sonzinsky* case, *supra*, this Court reviewed the authorities and laid down the principles which are applicable to the commerce power as well as to the taxing power. The Court said (300 U. S., at 513–514):

> * * * we are asked to say that the tax, by virtue of its deterrent effect on the activities taxed, operates as a regulation which is beyond the congressional power.
>
> Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect, *United States* v. *Doremus*, *supra*, 93, 94; *Nigro* v. *United States*, 276 U. S. 332, 353, 354; *License Tax Cases*, *supra*; see *Child Labor Tax Case*, *supra*, 38; and it has long been established that an Act of Congress which on its face purports to be an ex-

[50] "Fifty years ago a tax on state banks, the obvious purpose and actual effect of which was to drive them, or at least their circulation, out of existence, was sustained, although the result was one that Congress had no constitutional power to require. The Court made short work of the argument as to the purpose of the act." Holmes, J., dissenting, in *Hammer* v. *Dagenhart*, 247 U. S. 251, 278–279.

[51] The tax upon oleomargarine colored to resemble butter "was so great as obviously to prohibit the manufacture and sale." Holmes, J., dissenting, in *Hammer* v. *Dagenhart*, 247 U. S. 251, 278.

ercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548; *McCray* v. *United States*, 195 U. S. 27, 60–61; cf. *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, 48.

Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. *Veazie Bank* v. *Fenno, supra; McCray* v. *United States, supra*, 56–59; *United States* v. *Doremus, supra*, 93–94; see *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44, 45; cf. *Arizona* v. *California*, 283 U. S. 423, 455; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 210; *Weber* v. *Freed*, 239 U. S. 325, 329–330; *Fletcher* v. *Peck*, 6 Cranch 87, 130. They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. *McCray* v. *United States, supra;* cf. *Magnano Co.* v. *Hamilton, supra*, 45.

Here the annual tax of $200 is productive of some revenue. We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power. *Alston* v. *United States*, 274 U. S. 289, 294; *Nigro* v.

United States, supra, 352, 353; *Hampton & Co.* v. *United States,* 276 U. S. 394, 411, 413.

These cases arising under both the commerce and taxing powers demonstrate that Federal statutes are not rendered invalid because of their "deterrent" or "regulatory" effect upon matters not subject to congressional power—that "if an Act is within the powers specifically conferred upon Congress, * * * it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, * * *." Holmes, J., dissenting, in *Hammer* v. *Dagenhart,* 247 U. S. 251, p. 277.

2. *The purpose of a regulation of interstate commerce cannot affect its constitutionality; but if purpose be relevant, this statute has a valid commerce purpose*

(a) THE PURPOSE OF A REGULATION OF INTERSTATE COMMERCE CANNOT AFFECT ITS CONSTITUTIONALITY

This Court has from the beginning recognized that "the commerce clause (Art. I, § 8, par. 3) confers upon the Congress 'the power to regulate, that is, to prescribe the rule by which commerce is to be governed.' This power 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.' *Gibbons* v. *Ogden,* 9 Wheat. 1, 196." *Kentucky Whip and Collar* v. *Illinois Central Railroad,* 299 U. S. 334, 345; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 147; *Currin* v. *Wallace, supra.*

The view that a regulation of interstate commerce may be invalid if enacted for a *purpose* not directly related to such commerce is consistent neither with these principles nor with the language of the Constitution. When Congress regulates intrastate transactions which directly affect interstate commerce, the purpose of the regulation may be relevant, since the regulation as well as the subject regulated must have some relation to interstate commerce. Cf. *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330. But such considerations are entirely out of place when what is regulated is interstate commerce itself.

The contention that the commerce power may not be exercised for purposes not in themselves directly concerned with interstate commerce seems to rest upon a confusion between the *power* on the one hand and the *subject matter* upon which, and the *purpose* or *objective* for which, the power may be exercised, on the other. The fact that the wide varieties of subject matter upon which the granted powers of Congress may be exerted (and upon some of which they will have to be exerted if they are exerted at all), are not specifically enumerated in the Constitution, obviously does not mean that Congress is barred from asserting its powers upon such subject, for none are enumerated. In the same way the fact that the various objectives which may be deemed desirable by Congress, and for which Congress may conceivably wish to assert one or more of its granted powers, are not ex-

pressly enumerated, obviously does not mean that Congress must confine itself to objectives which *are* enumerated, for none are, save in the broad language of the preamble. The proposition that the power to regulate commerce can be asserted only for the sake of commerce, or for a purpose related to commerce rests upon an assumption the general acceptance of which would make practically impossible either the construction of the Constitution or the operation of government under it.

Such a construction of the commerce clause was repudiated in the first case arising under it. *United States* v. *The William, supra,* p. 51. Judge Davis there referred to the history of the commerce clause at the time the Constitution was ratified, and concluded that the power over commerce was not limited to its advancement but included the power to abridge it "in favor of the great principles of humanity and justice." He said (28 Fed. Cas., at 621):

> Further, the power to regulate commerce is not to be confined to the adoption of measures, exclusively beneficial to commerce itself, or tending to its advancement; but, in our national system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest. The mode of its management is a consideration of great delicacy and importance; but, the national right, or power, under the constitution, to adapt regulations of commerce to other purposes, than

> the mere advancement of commerce, appear to me unquestionable. * * * It was perceived, that, under the power of regulating commerce, congress would be authorized to abridge it, in favour of the great principles of humanity and justice. Hence the introduction of a clause, in the constitution, so framed, as to interdict a prohibition of the slave trade, until 1808. Massachusetts and New York proposed a stipulation, that should prevent the erection of commercial companies, with exclusive advantages. Virginia and North Carolina suggested an amendment, that "no navigation law, or law regulating commerce, should be passed, without the consent of two thirds of the members present, in both houses." These proposed amendments were not adopted, but they manifest the public conceptions, at the time, of the extent of the powers of Congress, relative to commerce.

The notion that a granted power may not be employed for any purpose not expressed in the grant was early sought to be introduced into our constitutional thinking by opponents of a protective tariff, and was answered conclusively and exhaustively by Mr. Justice Story. Speaking of the taxing power, Mr. Justice Story says (*Commentaries on the Constitution,* Sec. 965, 4th ed.):

> The language of the Constitution is, "Congress shall have power to lay and collect taxes, duties, imposts, and excises." If the clause had stopped here, and remained in this

absolute form, * * * there could not have been the slightest doubt on the subject. The absolute power to lay taxes includes the power in every form in which it may be used, *and for every purpose to which the legislature may choose to apply it.* This results from the very nature of such an unrestricted power. *A fortiori* it might be applied by Congress to purposes for which nations have been accustomed to apply it. Now nothing is more clear, from the history of commercial nations, than the fact that the taxing power is often, very often, applied for other purposes than revenue. It is often applied as a regulation of commerce. It is often applied as a virtual prohibition upon the importation of particular articles for the encouragement and protection of domestic products and industry; for the support of agriculture, commerce, and manufactures; for retaliation upon foreign monopolies and injurious restrictions; for mere purposes of state policy and domestic economy; sometimes to banish a noxious article of consumption; sometimes as a bounty upon an infant manufacture or agricultural product; sometimes as a temporary restraint of trade; sometimes as a suppression of particular employments; sometimes as a prerogative power to destroy competition, and secure a monopoly to the government! [Italics supplied.]

The Constitution does not explicitly say that the Federal Government has power to encourage and protect domestic production, to support agriculture

ful" (Appendix, p. 208). The emphasis throughout is on keeping excessive supplies *off the market*, not on prohibiting their production.

(3) The marketing quota regulations do not necessarily affect production. The distinction between regulating production and regulating marketing is not an academic or unreal one. Tobacco (as well as the other crops regulated under Title III of the Act) can be stored for a long period of time. Indeed practically all tobacco is stored for a period of one to five years before it is used (R. 63). If an amount in excess of marketing quotas is grown, that excess can be stored for sale in years when marketing quotas are not in effect, or when a grower produces less than his quota. Although individual growers may have difficulty in redrying tobacco for storage, growers acting cooperatively can readily do so (see pp. 23–24, *supra*). Furthermore, the Act provides for federal loans to enable farmers to finance the storage of commodities (Sec. 302 (a)).

The possibility of growers later selling excess tobacco withheld from market in a quota year is not a merely theoretical prospect. The Act provides that quotas may be established only after the Secretary has found that the total supply of tobacco exceeds the reserve supply level and after two-thirds of the farmers engaged in producing the crop have voted in favor of the quota (Sec. 312 (a), (c)). If either of these two conditions is not met in any year, quotas do not become operative the next year.

Adverse weather conditions or numberless other factors may reduce production in any year so as to remove all basis for quotas in the next year. All tobacco held over may be sold in such a year. Similarly, adverse conditions confined to a local area or to individual farms will leave some farmers each year without their full quota of new tobacco to sell. Even if quotas are in effect such a farmer may then sell his stored tobacco within his quota.

Furthermore, the farmers themselves may procure the suspension of quotas in any year. The present litigation involves quotas for the marketing year 1938–1939 (July 1, 1938–June 30, 1939). Although on November 21, 1938 (3 Fed. Register 2769), the Secretary proclaimed that the supply as of the beginning of the marketing year 1939–1940 exceeded the reserve supply level for that marketing year and specified a national marketing quota, over one-third (though considerably less than a majority) of the growers voted against the establishment of such quotas in the referendum held under the Act on December 10, 1938. Accordingly, no marketing quotas for flue-cured tobacco will be in effect for the year 1939–1940, and any excess stocks not sold in the marketing year 1938–1939 may be marketed free of penalty after the expiration of that period.[45]

[45] Although the individual growers in Georgia and Florida did not have facilities for redrying and storing their excess tobacco, they could have foreseen the problem and taken steps to meet it. See opinion of Judge Sibley, R. 186.

acceded to it, for it would have sealed their ruin. The same reasoning would apply to the agricultural States; for the regulation of commerce, with a view to encourage domestic agriculture, is just as important, and just as vital to the interests of the nation, and just as much an application of the power, as the protection or encouragement of manufactures. It would have been strange, indeed, if the people of the United States had been solicitous solely to advance and encourage commerce, with a total disregard of the interests of agriculture and manufactures, which had, at the time of the adoption of the Constitution, an unequivocal preponderance throughout the Union. It is manifest, from contemporaneous documents, that one object of the Constitution was to encourage manufactures and agriculture by this very use of the power.

* * * * *

§ 1089. Now, the motive of the grant of the power is not even alluded to in the Constitution. It is not even stated that Congress shall have power to promote and encourage domestic navigation and trade. A power to regulate commerce is not necessarily a power to advance its interests. It may in given cases suspend its operations and restrict its advancement and scope. Yet no man ever yet doubted the right of Congress to lay duties to promote and encourage domestic navigation, whether in the form of tonnage duties, or other preferences and privileges, either in the foreign trade,

or coasting trade, or fisheries. It is as certain as anything human can be, that the sole object of Congress, in securing the vast privileges to American built ships, by such preferences, and privileges, and tonnage duties, was, to encourage the domestic manufacture of ships, and all the dependent branches of business. It speaks out in the language of all their laws, and has been as constantly avowed and acted on as any single legislative policy ever has been. No one ever dreamed that revenue constituted the slightest ingredient in these laws. They were purely for the encouragement of home manufactures, and home artisans, and home pursuits. Upon what grounds can Congress constitutionally apply the power to regulate commerce to one great class of domestic manufactures, which does not involve the right to encourage all? * * * There are many products of agriculture and manufactures which are connected with the prosperity of commerce as intimately as domestic ship-building. If the one may be encouraged, as a primary motive in regulations of commerce, why may not the others? The truth is, that the encouragement of domestic ship-building is within the scope of the power to regulate commerce, simply because it is a known and ordinary means of exercising the power. It is one of many, and may be used like all others, according to legislative discretion. The motive to the exercise of a power can never form a consti-

tutional objection to the exercise of th power.

Appellants' argument amounts to contending that in addition to enumerating the powers conferred on the federal government, the Constitution should have enumerated the infinite variety of objectives or purposes for which those powers may be exercised. The plain answer is that it does not do so. The framers of the Constitution, designedly according to Marshall, couched even their grants of power in broad general terms, leaving much to implication. What Marshall has said in a famous passage in regard to this economy of expression relating to powers, amply explains and justifies the decision of the framers not to enumerate objectives. Marshall says (*McCulloch* v. *Maryland*, 4 Wheat. 316, 407):

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.

This Court in repeated instances has sustained the exercise of the federal power over interstate

commerce to accomplish objectives, the promotion of which is not only not conferred on Congress by the Constitution in express terms but which, within the geographical limits of each separate state, were appropriate objects of state legislation. Thus Congress has no general power to protect the morals of the people of the United States and, more specifically, has no power to give such protection by the suppression of lotteries. On the other hand, each state, within its own limits, may employ its police power to suppress lotteries. Nevertheless, this Court has held that the commerce power may be used with the objective of suppressing lotteries so far as that objective may be obtained by regulations of commerce, and the regulations are not invalid because the suppression of lotteries is their object (*Champion* v. *Ames,* 188 U. S. 321).

It could have been urged against the Pure Food and Drug Act that its purpose was to promote health and that the Constitution nowhere confers upon the federal government any power to promate health (*Hipolite Egg Co.* v. *United States,* 220 U. S. 45); it could have been urged against the Mann White Slave Act that its objective was to promote morality and that the Constitution nowhere confers upon the federal government the power to promote morality (*Hoke* v. *United States,* 227 U. S. 308); it could have been urged against the Motor Vehicle Theft Act and the Kidnaping Act that their objective was to prevent theft (of property or persons) and that the

Constitution nowhere confers upon the federal government the power to prevent theft (*Brooks* v. *United States,* 267 U. S. 432; *Gooch* v. *United States,* 297 U. S. 124). In all these cases, however, the Acts were sustained because, irrespective of their various objectives, what was regulated was interstate commerce. The fact that the objective of each was, in one way or another, to promote the general welfare did not invalidate them as regulations of commerce, but served rather to justify them under the due process clause. See p. 156, *infra.*

This Court has stated that Congress may exercise "the police power, for the benefit of the public, in the field of interstate commerce." *Brooks* v. *United States,* 267 U. S. 432, 436–437; *Ky. Whip & Collar Co.* v. *I. C. R. Co.,* 299 U. S. 334, 347. As the Chief Justice declared in his opinion in *Carter* v. *Carter Coal Co.,* 298 U. S., at 319: "We are not at liberty to deny to the Congress, with respect to interstate commerce, a power commensurate with that enjoyed by the States in the regulation of their internal commerce. See *Nebbia* v. *New York,* 291 U. S. 502." [52] The power of the states "in the regu-

[52] This view as to the scope of the commerce power stems from *Gibbons* v. *Ogden,* 9 Wheat. 1, 197, where Chief Justice Marshall said:

> * * * the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the con-

lation of their internal commerce" is absolute, subject only to the specific limitations of the Constitution, including those contained in the Fourteenth Amendment. States obviously need not regulate such commerce for a "commerce purpose," but may do so for any reason which their legislatures believe to be in the public interest. In the field of interstate commerce Congress must be equally free, subject only to the specific limitations in the Fifth Amendment. If federal legislation regulating interstate commerce does not violate the due process clause, it also must be constitutional irrespective of whether it has a "commerce purpose." The concept of a commerce purpose as a limitation on the power of Congress to regulate interstate commerce is thus inconsistent both with the historical background of the Constitution and with the cases decided under it."

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stitution of the United States. The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

In his concurring opinion in the same case Mr. Justice Johnson stated that (p. 227):

> The "power to regulate commerce," here meant to be granted, was that power to regulate commerce which previously existed in the states.

" The only case which might be regarded as inconsistent with these views is *Hammer* v. *Dagenhart*, 247 U. S. 251, which we believe to have been wrongly decided. The case is discussed *infra*, pp. 112–118.

(b) THIS ACT HAS A LEGITIMATE COMMERCE PURPOSE

Although it is our view that when interstate commerce itself is being regulated the purpose of Congress is immaterial, examination of the purposes of Congress in enacting the Agricultural Adjustment Act of 1938 will demonstrate that the statute is valid even if the most orthodox "commerce purpose" is deemed requisite. The purposes of Congress in enacting the marketing quota provisions of the Act are not subject to inference or speculation. Both the statute itself and the reports of the Congressional committees approving it state specifically what those purposes are.

Section 2 of the Act, entitled "Declaration of Policy," provides *inter alia*[54] that—

> It is hereby declared to be the policy of Congress * * * to assist in the marketing of agricultural commodities for domestic consumption and for export; and to regulate interstate and foreign commerce in cotton, wheat, corn, tobacco, and rice to the extent necessary to provide an orderly, adequate, and balanced flow of such commodities in interstate and foreign commerce through storage of reserve supplies, loans, marketing quotas, assisting farmers to obtain, insofar as practicable, parity prices for such commodities and parity of income, and assisting consumers to obtain an adequate and steady supply of such commodities at fair prices.

[54] The omitted portion sets forth the policy supporting the Soil Conservation and Domestic Allotment Act, as amended by Title I of the Act.

The report of the Committee on Agriculture of the House of Representatives (H. R. Rep. 1645, 75th Cong., 2d Sess.) referring to the quota provisions of the House Bill, H. R. 8505, which, in the case of tobacco are substantially the same as the challenged sections of the Act, states (Appendix, p. 208):

> In years of excessive production it provides for the withholding from market in interstate and foreign commerce of surpluses of the five major non-perishable agricultural commodities for the purpose of removing the depressing effect which such surpluses exert on such commerce.

The Report of the Senate Committee on Agriculture and Forestry, S. Rep. 1295, 75th Cong., 2d Sess., likewise discloses the purpose to regulate interstate and foreign commerce in order to maintain a balanced quantity of farm products marketed in commerce and thereby to avoid the disorderly marketing which results from surpluses in years of excessive yield and shortages in lean years, and to stabilize prices so as to protect farmers against unreasonably high prices (Appendix, pp. 233–234).

Such statements by Congress as to its purposes in enacting legislation will, of course, be accepted by the courts. Although legislative findings of objective facts supporting constitutionality may establish the facts so described only presumptively, subject to disproof in judicial proceedings (*United*

States v. *Carolene Products Co.*, 304 U. S. 152), a Congressional declaration of legislat purpose—a subjective matter—is not subject review.

It should be noted that these purposes are to achieved only through control of the amount ma keted, not of the amount produced. The statu was not designed to prohibit production in exce of current market demands. On the contrary was designed to encourage farmers to store quan tities produced in excess of marketing quotas fo use in lean years (see p. 63, *supra*).

That stabilization of the flow of commodities i interstate commerce and of the prices at which such goods are marketed, for the benefit of producer and consumers, is an appropriate purpose unde the commerce clause cannot be gainsaid.

The appellants concede the power of Congres to prohibit all interstate commerce in things con traband or things likely to be injurious to the in habitants of the several states (Appellants' Brief p. 16). It is evident from the record and from th evidence considered by Congress that the market ing of abnormally excessive supplies of tobacc directly injures those who grow it and sell it in in terstate and foreign commerce, and, if unregu lated, interrupts and destroys such commerce it self. The prevention of these economic effect upon commerce and upon those engaged in com merce is much more closely related to the underly

ing objectives of the commerce clause than protection of the public morals against lotteries (*Champion* v. *Ames, supra*), or prostitution (*Hoke* v. *United States, supra*), or theft (*Brooks* v. *United States, supra*), or kidnaping (*Gooch* v. *United States, supra*), or the protection of the public health against diseased livestock (*Reid* v. *Colorado,* 187 U. S. 137), or adulterated foods and drugs (*Hipolite Egg Co.* v. *United States,* 220 U. S. 45; *Seven Cases* v. *United States,* 239 U. S. 510), or diseased plants (*Oreg.-Washington Co.* v. *Washington,* 270 U. S. 87). The original purpose of the commerce clause was primarily economic, and the objectives of the most important commerce legislation enacted by Congress, like those of this Act, were to improve the economic well-being of the nation.

Probably the earliest commerce statute of note was the protective tariff, first enacted in 1789 (Act of July 4, 1789, c. 2, 1 Stat. 24). The well-known purpose of that statute, as well as of its numerous successors, was to protect and encourage American manufacturers against foreign competition by raising the prices on imported goods, thereby permitting domestic manufacturers to sell at increased prices. See Story, *supra,* §§ 1091–1092; Hamilton, *Report on Manufactures,* III Hamilton's Works 192. Similarly, the purpose of the Agricultural Adjustment Act is to raise prices to farmers (most of whom sell in interstate commerce) and stabilize marketings. That the pro-

tection of manufacturing through a tariff and t
encouragement of agriculture were deemed b
Story to be equally within the commerce power
appears from the passage quoted, *supra*, pp. 79–8
part of which so closely fits the instant case as t
warrant repetition. The learned Justice there
states (*Commentaries on the Constitution*, Sec.
1082):

> Now it is well known that, in commercial and manufacturing nations, the power to regulate commerce has embraced practically the encouragement of manufactures * * * When the Constitution was framed, no one ever imagined that the power of protection of manufactures was to be taken away from all the States, and yet not delegated to the

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[55] The constitutionality of the tariff can be based on either the commerce power or the taxing power (*Board of Trustees* v. *U. S.*, 289 U. S. 48; *Hampton & Co.* v. *United States*, 276 U. S. 394). A purpose to protect the interests of manufacturers or farmers would seem to be more closely related to the former power than to the latter.

As was said by Judge Sibley, speaking for the Circuit Court of Appeals for the Fifth Circuit in *Whittenburg* v. *United States*, 100 F. (2d) 520, 522, after referring to the statement of policy in the Act (Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. § 608)):

> * * * This really states the public aim of the Act, and marks it as intending to regulate and sustain interstate commerce for the public good. But if better prices to farmers be taken as the aim, it is only the correction of an injustice that has long been wrought by another use of the commerce power in the fixing of protective tariffs, by which revenue was not sought to be raised, but prices to manufacturers increased, largely at the farmers' expense. The tariff operates only indirectly to raise prices, but is very effectual.

> Union. The very suggestion would of itself have been fatal to the adoption of the Constitution. The manufacturing States would never have acceded to it upon any such terms * * * The same reasoning would apply to the agricultural States; *for the regulation of commerce, with a view to encourage domestic agriculture, is just as important, and just as vital to the interests of the nation, and just as much an application of the power, as the protection or encouragement of manufactures.* It would have been strange, indeed, if the people of the United States had been solicitous solely to advance and encourage commerce, with a total disregard of the interests of agriculture and manufactures * * *. [Italics supplied.]

In Sec. 1084 of the *Commentaries,* Justice Story proceeds:

> * * * No man can doubt that domestic agriculture and manufactures may be most essentially promoted and protected by regulations of commerce. No man can doubt that it is the most usual, and generally the most efficient means of producing those results. * * *

Similarly the ultimate purpose of every important statute enacted under the commerce clause has been not merly to promote the physical movement of commodities but to protect and benefit the public or particular groups of persons constituting the public. The ultimate purpose of the original interstate Commerce Act was to protect shippers against

and manufactures, to set up a policy of domestic economy, to restrain trade, temporarily or otherwise, to suppress particular employments, or to secure a government monopoly. The Constitution does, however, explicitly say that the Federal Government has power to lay and collect taxes, duties, imposts, and excises, and since the taxing power is susceptible of being used to further the foregoing objectives, the Federal Government, as Mr. Justice Story points out, has power to further them through use of the taxing power. The fact that they are not set out as express powers in the Constitution does not cut down the plenary grant of the taxing power to the point where it may not be exerted to effectuate them.

Mr. Justice Story develops the same argument in connection with the commerce power. (*Commentaries on the Constitution*, Secs. 1079–1089.) He states the position which he is refuting, and which represents precisely the position now taken by the appellants, as follows (Sec. 1079):

> But the question is a very different one, whether, under pretense of an exercise of the power to regulate commerce, Congress may in fact impose duties for objects wholly distinct from commerce. The question comes to this, whether a power exclusively for the regulation of commerce is a power for the regulation of manufactures?

In answering the question he begins by pointing out that those who claim that the commerce power should be used only for the sake of commerce and

the taxing power only for the sake of revenue "* * * admit that the power may be applied so as incidentally to give protection to manufactures, when revenue is the principal design; and that it may also be applied to countervail the injurious regulations of foreign powers, when there is no design of revenue" (Sec. 1081). He then continues (Sec. 1081):

> * * * These concessions admit, then, that the regulations of commerce are not wholly for purposes of revenue, or wholly confined to the purposes of commerce, considered *per se*. If this be true, then other objects may enter into commercial regulations; and, if so, what restraint is there as to the nature or extent of the objects to which they may reach, which does not resolve itself into a question of expediency and policy? It may be admitted that a power given for one purpose cannot be perverted to purposes wholly opposite, or beside its legitimate scope. But what perversion is there in applying a power to the very purposes to which it has been usually applied? * * *
>
> § 1082. * * * When the Constitution was framed, no one ever imagined that the power of protection of manufactures was to be taken away from all the States, and yet not delegated to the Union. The very suggestion would of itself have been fatal to the adoption of the Constitution. The manufacturing States would never have acceded to it upon any such terms; and they never could, without the power, have safely

has frequently indicated. *Second Employers' Liability Cases,* 223 U. S. 1, 47; *Texas & N. O. R. Co.* v. *Ry. Clerks,* 281 U. S. 548, 570; *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 37. "A power to regulate commerce is not necessarily a power to advance its interests. It may in given cases suspend its operations and restrict its advancement and scope." Story, *Commentaries,* Sec. 1089. See also *United States* v. *The William,* Fed. Cas. No. 16,709, 28 Fed. Cas. 614, p. 106.

3. *Even though the Act were to be regarded as a direct regulation of the amount of tobacco produced, it would not for that reason fall without the commerce power*

We believe that this Act has been plainly shown to be a regulation of marketing and not of production. However, the appellants' arguments are all based upon the proposition that the Act is a regulation of production. Accordingly, we deem it desirable to point out, in addition, that even if it were so regarded it would nevertheless be valid.[57]

This Court has frequently pointed out that "the power to regulate commerce is the power to enact

[57] We have shown that there is a distinction between regulating the amount marketed and regulating the amount produced. However, in this section of the brief we are accepting, for purposes of the argument, appellants' premise that this distinction is unreal. We, accordingly, treat findings and evidence as to the quantity of tobacco "marketed" and "produced" without making the differentiation which we insist upon elsewhere in the brief.

'all appropriate legislation' for 'its protection and advancement' (*The Daniel Ball,* 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (*County of Mobile* v. *Kimball,* 102 U. S. 691, 696, 697); 'to foster, protect, control, and restrain.' *Second Employers' Liability Cases, supra,* p. 47. See *Texas & N. O. R. Co.* v. *Ry. Clerks, supra.* That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it'. *Second Employers Liability Cases,* p. 51; *Schechter Corp.* v. *United States, supra.* Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. * * *

"The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. * * *" *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, at 36–38; *Santa Cruz Co.* v. *Labor Board,* 303 U. S. 453, 464.

These principles have been applied to intrastate transactions occurring before interstate commerce begins. *Coronado Co.* v. *U. M. Workers,* 268 U. S. 295; *Santa Cruz Co.* v. *Labor Board, supra.* In the

Santa Cruz case the Court held that (303 U. S. at 465):

> With respect to the federal power to protect interstate commerce in the commodities produced, there is obviously no difference between coal mined, or stone quarried, *and fruit and vegetables grown.* [Italics supplied.]

The Court there rejected the petitioner's argument as to its productive facilities not being subject to the commerce clause partly upon the ground that petitioner itself was engaged in interstate commerce. This is just as true of the growers of tobacco here as it was of the Fruit Packing Company; both sell the commodities they grow or process for shipment in interstate commerce.[58]

Thus even if the Act were to be deemed a regulation of production, it would not be invalid in the absence of a showing that the production so regulated does not directly affect interstate commerce.

The facts of record and those of which this Court may take notice demonstrate that the effect upon commerce of the amount of tobacco produced is direct and substantial. They thus bulwark the presumption that facts exist to support the legislative judgment and the findings of Congress in the statute and committee reports, which, unless dis-

[58] Congress may also regulate local activities of persons who, themselves, engage in no interstate activities whatever if their activities directly affect interstate commerce. *Consolidated Edison Co.* v. *National Labor Relations Board*, No. 19, this term.

proved, are binding upon the Court. See *U. S.* v. *Carolene Products Co.*, 304 U. S. 144; *Stafford* v. *Wallace*, 258 U. S. 495; and *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1. Here neither the presumption nor the findings have been disproved. On the contrary the record supports them. Thus the Court here is doubly bound to accept the findings of the legislature.

In Section 311 of the Act Congress made the following findings with respect to tobacco:

> (b) The disorderly marketing of such abnormally excessive supplies affects, burdens, and obstructs interstate and foreign commerce by (1) materially affecting the volume of such commodity marketed therein, (2) disrupting the orderly marketing of such commodity therein, (3) reducing the price for such commodity with consequent injury and destruction of interstate and foreign commerce in such commodity, and (4) causing a disparity between the prices for such commodity in interstate and foreign commerce and industrial products therein, with a consequent diminution of the volume of interstate and foreign commerce in industrial products.
>
> (c) Whenever an abnormally excessive supply of tobacco exists, the marketing of such commodity by the producers thereof directly and substantially affects interstate and foreign commerce in such commodity and its products, and the operation of the provisions of this Part becomes necessary

and appropriate in order to promote, foster, and maintain an orderly flow of such supply in interstate and foreign commerce.

These findings are repeated and amplified in the reports of the Congressional Committees (see Appendix, *infra, pp.* 205–240). The legislative findings and the record demonstrate that the amount of tobacco produced and marketed determines the supply, which consists of the amount produced and marketed each year, plus the quantity in storage from preceding years. Supply, present and prospective, is the predominant determinant of the price (R. 78). Because the cost of tobacco is only a small part of the cost to consumers of manufactured tobacco products [59] and because the manufacturers follow fixed price policies (H. R. Rep. 1645, Appendix, p. 224), neither the consumer demand nor the price paid

[59] A computation from the record demonstrates that the cost of the flue-cured tobacco (52 percent of the total tobacco) in a standard package of cigarettes selling from 12 to 15 cents is less than three-fourths of a cent. The record shows that almost all cigarettes weigh *less* than 3 pounds per thousand (R. 71). Assuming a weight of 3 pounds per thousand, the weight of a package of 20 cigarettes would be $^{6}/_{100}$ of a pound. With 52 percent of the tobacco flue-cured (R. 64), the flue-cured tobacco in the pack would weigh $^{3}/_{100}$ of a pound. At the 1937 price of 23 cents a pound (R. 79) this would bring the farmer .69 of a cent. This figure should be adjusted slightly upwafd because of a small difference between farm sales weight of tobacco and weight after processing.

The remainder of the price paid by the consumer goes to cover taxes, manufacturing, distributing, advertising, and

by consumers is materially affected by changes in the price paid to growers for tobacco. Accordingly, a decrease in the farm price does not result in increased consumption, with the consequent adjustment between supply, demand, and price which would be expected under orthodox, economic theory (H. R. Rep. 1645; Appendix, p. 224). With demand relatively stable price is controlled largely by supply.

The price of course, also affects the supply, but only at yearly intervals. Prices may vary from day to day while the supply depends upon the amount marketed each year. Moreover, since farmers have inadequate knowledge of demand and would be unable to use that knowledge if they possessed it, since at the time they plant their crop, they are only informed of the previous years' prices, and since (except after years of unduly low prices) each farmer feels that it is to his interest to plant as much as he can, they are in no position to adjust either their marketing or their production so as to conform accurately to demand or to control price except in a rough way and over a period of years (R. 73–74).

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storage costs, and profits for the manufacturers and dealers (R. 73–74, 84).

A change of 20 percent in the farm price would affect the consumer's price only 1 percent—from .12 to .15 of a cent. Changes that small probably would not be passed on to the consumer through an increase in the retail price, even if the manufacturers did not follow fixed price policies.

Consequently, although price and supply each react upon the other, over a short term, price is dominated by supply. The record states that: "The price of flue-cured tobacco reacts to changes in the supply. During the period 1920 to 1937 the changes in the supply were associated with changes in the price. With the exception of one year (1922), the price has decreased relative to the previous year when the supply increased relative to the previous year. Without exception the price has increased relative to the previous year when the supply decreased relative to the previous year (Table 14, Chart II)" (R. 78).

Even more significant than the obvious relationship between supply and price is the relationship between an excessive supply and a fair price to the farmer. The record states that "In years when the actual supply was greater than the reserve supply level, the price of flue-cured tobacco was lower relative to the parity price.[60] * * * In years when the actual supply was less than the reserve supply level, prices of flue-cured tobacco were higher relative to parity prices" (R. 78).

Moreover a relatively small excess will bring about a large diminution of price. (See Chart IV,

[60] The "parity price" or "computed price" used in the stipulation (R. 78–79) as an index of the purchasing power of a pound of tobacco is the season's average price that would have given flue-cured tobacco the same purchasing power with respect to things farmers buy that existed during the ten-year period August 1919–July 1929 (R. 78–79) (see Section 2, and Section 301 (a) (1) Appendix, pp. 177, 179).

.) For example between 1929 and 1930 the
s of actual supply over the reserve supply level
ased by only 6 percent (R. 76). The aver-
rice in the same period dropped 33.3 percent,
20 percent below the parity price to 40 per-
elow the parity price (R. 79, 82). As would
pected where demand is inelastic a small ex-
of supply usually causes a large decrease in

is analysis indicates that the most appropriate
od of stabilizing the price of tobacco (apart
price-fixing itself) is by striking at the pri-
cause of price fluctuations—an unbalanced
y. That may be done either by regulating
uantity produced or by regulating the quan-
which may be marketed when supplies are
sive. Either method would have the effect of
ishing fluctuations. Thus control of produc-
would constitute one appropriate means of
cting interstate commerce in tobacco against
rice fluctuations described above.

at it is proper for Congress to regulate local
ty in order to stabilize interstate prices cannot
bject to doubt. The most striking illustration
ch an exercise of federal power is the Grain
res Act upheld in *Chicago Board of Trade* v.
, 262 U. S. 1. That statute regulated contracts
ales of grain for future delivery, most of
, this Court said (p. 36), "do not result in
l delivery but are settled by offsetting them

unreasonable and discriminatory rail rates. Th objective of the Sherman Act was to protect con sumers against unreasonably high prices. The purposes of the Ashurst-Sumners Prison-Made Goods Act was to protect manufacturers and work- ers against the competition of poorly paid prison labor. The purpose of the Tobacco Inspection Act was to protect farmers against undue price varia- tions. Each of the statutes referred to regulates interstate commerce itself,[56] as does the Act in ques- tion here.

The statutes upheld in *Stafford* v. *Wallace*, 258 U. S. 495, and *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, regulated intrastate transactions di- rectly affecting interstate commerce for the pri- mary purpose of protecting farmers against low or fluctuating prices and unfair practices. In the *Stafford* case this Court pointed out (p. 514):

> The chief evil feared is the monopoly of the packers, enabling them unduly and ar- bitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. * * * Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any

[56] Except for the Sherman Act, which also applies to intra- state restraints upon interstate commerce. See *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295.

> unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce.

The purpose of the regulation upheld in the *Olsen* case was the protection of producers and consumers against fluctuations in the price of grain caused by speculation and manipulation of the futures markets (262 U. S., at 537). The Court accepted the finding of Congress that such price fluctuations directly burdened and obstructed interstate commerce (*id.* at 39–40), thus, plainly indicating that control of the prices of agricultural commodities was a proper purpose of Congress under the commerce clause.

This brief analysis of the statutes and authorities demonstrates plainly that the commerce clause has always been regarded as most appropriately to be exercised to benefit the economic interests of the public—of manufacturers, farmers, shippers, or consumers. And the kind of regulation most frequently sustained has been that which has as its ultimate objective the raising (the tariff), lowering (Sherman Act), or stabilizing (Tobacco Inspection and Grain Futures Acts) of prices. As the Court pointed out in the *Olsen* case, in upholding federal regulation of intrastate transactions (262 U. S., at 40):

> The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it.

One of the primary goals of Congress in enacting the Agricultural Adjustment Act of 1938, was to control the marketing of agricultural commodities in order to stabilize farm prices at an adequate, fair level. A direct regulation of the prices sought to be controlled, most of which are prices in interstate sales, would, in the language of Mr. Justice Cardozo in the *Carter* case, have been "to regulate commerce itself" (298 U. S., at 326). Thus, the purpose of Congress in regulating one aspect of interstate commerce—the amount marketed—is to influence another aspect of interstate commerce—the price. A statute with an objective more legitimately or closely related to the regulation of interstate commerce would be difficult to find.

The same is true of the other primary purpose of the Act—balancing the flow in commerce of agricultural commodities so as to insure distribution proportionate to demand in years of over-production and of shortage. The *Stafford* and *Olsen* cases demonstrate that stabilizing the market through the removal of undesirable fluctuations in price and in the amount moved is an appropriate exercise of the commerce power even if applied to intrastate transactions. All the more so when interstate commerce itself is regulated as it is here.

What has been said disposes of the argument that the Act cannot be a regulation of commerce because it does not "benefit" commerce. A statute which is designed to aid and protect an interstate industry, including producers who sell in interstate

commerce, is designed to benefit commerce. Appellants' argument assumes that commerce is benefited only when it is increased, not when it is restricted. That obviously is not so, as the many cases sustaining statutes prohibiting commerce demonstrate. As Mr. Justice Cardozo said in his dissenting opinion in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, at 438 (on a point not passed upon in the majority opinion), with respect to restricting the interstate transportation of illegally produced petroleum:

> In its immediacy, the exclusion * * * from the channels of transportation is a restriction of interstate commerce, not a removal of obstructions. * * * But what is restriction in its immediacy may in its ultimate and larger consequences be expansion and development.

Commerce is benefited when an over-supply which unduly depresses prices is kept off the market, as well as when an obstruction to trade is removed. Cf. *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 372. There is no such thing as benefit to commerce in the abstract; the commerce power protects and promotes the interests of the public generally and of the persons who engage in or are dependent upon commerce.

But in any event the Constitution does not give Congress power only to "benefit" or "promote" commerce, but to regulate it. The power to regulate includes the power to restrain, as this Court

with other contracts of the same kind." The sales were between buyers and sellers in the city of Chicago, but they affected the price at which cash grain was sold throughout the country. Thus the question was not one of regulating the movement or the sale of a commodity in interstate commerce, but of regulating purely local activity which Congress had found affected the price of commodities moving in interstate commerce and caused price fluctuations which burdened and obstructed interstate commerce.

This Court sustained the regulation, declaring (pp. 39, 40):

> Manipulations of grain futures for speculative profit * * * exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand and discourage not only * * * justifiable hedging but disturb the normal flow of actual consignments.
>
> * * * * *
>
> If a corner and the enhancement of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulations of futures which unduly depress prices of grain in interstate commerce and directly influence consignment in that commerce are equally direct. The question of price dominates trade between the States. *Sales of an article which affect the*

country-wide price of the article directly affect the country-wide commerce in it. [Italics supplied.]

If Congress can regulate intrastate sales of grain futures because of their effect upon the price of grain,[61] it should equally have the power to regulate the quantity of tobacco marketed or produced because of its effect upon the price of tobacco.[62]

Neither argument nor evidence should be necessary to demonstrate that the amount of tobacco produced directly affects the amount shipped in interstate commerce. The larger—or smaller—quantity produced, the larger—or smaller—the quantity moving in interstate commerce. Control of the amount produced clearly would be a reasonable and appropriate means of exercising the unquestionable power of Congress to regulate the amount of a commodity to be permitted in interstate com-

[61] The more recent cases sustaining the validity of regulation of the futures markets are *Moore* v. *Chicago Mercantile Exchange*, 90 F. (2d) 735 (C. C. A. 7th), certiorari denied, 299 U. S. 606; *Bennett* v. *Board of Trade of City of Chicago*, 90 F. (2d) 735 (C. C. A. 7th), certiorari denied, 299 U. S. 606; *Board of Trade of Kansas City* v. *Milligan*, 90 F. (2d) 835 (C. C. A. 8th), certiorari denied, 299 U. S. 610. See also *Pete* v. *Howell*, decided December 14, 1938 (C. C. A. 7th), holding a corner on the grain exchanges a violation of the Sherman Act.

[62] The record here indicates that extremely low prices for tobacco may have the effect of completely obstructing the movement of the commodity in commerce. See pp. 35–37, *supra*.

merce. See *United States* v. *The William*, Fed. Cas. 16,700, 28 Fed. Cas. 614; *Griswold* v. *The President of the United States*, 82 F. (2d) 922. To hold that the effect of the amount produced upon the amount shipped is not direct would be "to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum." *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 41.

Cases under the Antitrust laws demonstrate that Congress may exercise its commerce power over intrastate transactions because of their effect upon the supply and price of goods moving into interstate commerce. *Standard Oil Co. (Indiana)* v. *United States*, 283 U. S. 163; *Coronado Co.* v. *U. M. Workers*, 268 U. S. 295; *United States* v. *Patten*, 226 U. S. 525; *Swift and Company* v. *United States*, 196 U. S. 375, 397; *United States* v. *Trenton Potteries*, 273 U. S. 392. In the *Standard Oil* case, *supra*, the Court declared (p. 169):

> Moreover, while manufacture is not interstate commerce, agreements concerning it which tend to *limit the supply or to fix the price* of goods entering into interstate commerce, or which have been executed for that purpose, are within the prohibitions of the Act. [Italics supplied.]

In the second *Coronado* case the Court ruled that "while the mere reduction in the supply of an article to be shipped in interstate commerce by the

illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce, nevertheless when the 'intent of those unlawfully preventing the manufacture or production is shown to be to *restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets*, their action is a direct violation of the Antitrust Act.'" (Italics supplied.) *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 40. The existence of a direct effect in fact upon interstate commerce plainly takes the place of the intention to restrain such commerce found necessary in the *Coronado* case.[63] *Labor Board* v. *Jones & Laughlin, supra; Santa Cruz* v. *Labor Board*, 303 U. S. 453; *Stafford* v. *Wallace*, 258 U. S. 495, 520.

The purpose of the Sherman Act is to prevent private restrictions upon the supply and price in interstate commerce because Congress regarded such restrictions as harmful to such commerce. With respect to the basic farm commodities, Con-

[63] There is a close parallel between the second *Coronado* case and the case at bar. In the one, the justification for Federal control is the effect upon commerce of a stoppage of production; in the other, it is the effect upon commerce of overproduction. In the one, the exercise of Federal power was occasioned by conditions which concerned production of an insignificant portion of the country's coal resources, coupled with a possible slight effect upon price. In the other, Federal power has been exercised by reason of the fact that conditions governing the supply of tobacco present a constant threat to the entire fabric of interstate commerce in that commodity.

gress now, with good reason, regards excessive supply and low prices as detrimental to commerce. The Antitrust Acts and the Agricultural Adjustment Act of 1938 reflect the fact that differing economic conditions call for different remedies. But both have the same objectives, the protection and promotion of interstate commerce. There can be no difference in constitutional power over intrastate transactions where the purpose is to protect interstate commerce against high prices and a limited supply and where the purpose is to protect it against low prices and an oversupply. It is the function of Congress to choose between economic theories and to determine the particular policy deemed necessary for the protection of interstate commerce against whatever evils affect it. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 337; *Nebbia* v. *New York*, 291 U. S. 502; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 319, 332 (dissenting opinions).

These decisions demonstrate that it is proper for Congress to regulate intrastate transactions because of their effect upon price and supply in interstate commerce. The effects of excessive marketing upon price and supply in such commerce were stated by Congress to be the reason for enacting the quota regulations in the Agricultural Adjustment Act of 1938. The purpose of the Act is to relieve interstate and foreign commerce from the disruptive effect of marketing more tobacco than can be absorbed at fair prices. A statute which was

esigned to and which did protect and foster inter-
tate commerce by these means would be valid no
natter whether its primary impact was on inter-
tate or intrastate transactions, on marketing, or
n production.

4. *The cases relied on by appellants are not controlling*

(a) UNITED STATES V. BUTLER AND CASES UNDER THE KERR-SMITH TOBACCO ACT

The Agricultural Adjustment Act of 1933 (48
tat. 31) provided for the payment of benefits to
armers who would agree to reduce acreage and for
ne imposition of processing taxes in order to pro-
ide funds for the benefit payments. A majority of
his Court held in *United States* v. *Butler*, 297 U. S.
that this constituted a regulation of production
ather than an exercise of the power to tax and
rovide for the general welfare of the United
tates. The provisions of the 1933 Act there under
eview did not purport to regulate interstate or
oreign commerce, and it was not claimed that they
ere valid under the commerce power (pp. 63–64).
The present Act regulates marketing, not pro-
uction. It is based on the determination of Con-
ress that marketing both constitutes and directly
ffects interstate and foreign commerce and there
ample evidence in the record to confirm this find-
g. The purpose and effect of the Act are to
abilize marketing and price, both legitimate
bjectives under the commerce clause. Cf. *Currin* v.
Wallace, supra. Thus, the present Act does not

regulate the subject matter found in the *Butler* case to be beyond the scope of federal power.

Even if the present statute be deemed a regulation of intrastate activity or production, it would not follow, because such a regulation could not be based upon the power to tax and provide for the general welfare that it does not come within the commerce power. Under the commerce power Congress may regulate incidents of production which directly affect interstate commerce (see pp. 96–98, *supra*). Any language in the *Butler* case susceptible of the construction that under no circumstances or under any granted power could such intrastate acts be regulated must be deemed to have been qualified by the subsequent decisions of this Court to the contrary in the Labor Board cases.[84]

It is clear from *Hill* v. *Wallace*, 259 U. S. 44 and *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, that Congress may utilize the commerce power to regulate subjects which it may not reach under the taxing power. The former case held invalid the Futures Trading Act (42 Stat. 187) which imposed prohibitive taxes on certain types of dealing in grain futures. The latter case sustained the constitutionality of the Grain Futures Act (42 Stat. 998), which contained an identical system of regulation under the commerce clause.

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[84] *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1; *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453; *Consolidated Edison Co.* v. *Labor Board*, Oct. Term, 1938, No. 19, this term.

. The Kerr-Smith Tobacco Act (48 Stat. 1275, 7 U. S. C. § 751) was a companion measure to the provisions of the Agricultural Adjustment Act of 1933 held invalid in the *Butler* case, and was repealed shortly after the decision in that case (49 Stat. 1106). The regulations in the two statutes were interconnected, in that farmers who carried out contracts with the Secretary of Agriculture to adjust production under the 1933 Adjustment Act were exempted from the Kerr-Smith Act. The cases holding the latter act invalid are grounded entirely upon the *Butler* case. *Robertson* v. *Taylor,* 90 F. (2d) 812 (C. C. A. 4th); *Glenn* v. *Smith,* 91 F. (2d) 447 (C. C. A. 6th), certiorari denied, 301 U. S. 691. See also *United States* v. *Moor,* 93 F. (2d) 422 (C. C. A. 5th) certiorari denied, 303 U. S. 663, a similar decision under the Bankhead Act. These decisions can, of course, carry no greater authority than the decision of this Court upon which they rely.

(b) CASES SUSTAINING STATE TAX OR REGULATORY STATUTES

Many of the cases cited by appellants hold only that state tax or regulatory statutes are constitutional (*Kidd* v. *Pearson,* 128 U. S. 1; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172; *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210; *Coe* v. *Errol,* 116 U. S. 517; *Crescent Oil Co.* v. *Mississippi,* 257 U. S. 129). That such cases do not establish a limitation upon the power of Congress is clear. As this Court said

in *Santa Cruz Co.* v. *Labor Board,* 303 U. S. 453, 466:

> Nor are the cases in point which are cited by petitioner with respect to the exercise of the power of the State to tax goods, which have not begun to move in interstate commerce or have come to rest within the State, or to adopt police measures as to local matters. In that class of cases the question is not with respect to the extent of the power of Congress to protect interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with that paramount authority. *Bacon* v. *Illinois,* 227 U. S. 504, 516; *Stafford* v. *Wallace, supra,* p. 526; *Minnesota* v. *Blasius,* 290 U. S. 1, 8.

(C) HAMMER V. DAGENHART

Hammer v. *Dagenhart,* 247 U. S. 251, denied to Congress the power to prohibit the interstate shipments of products from factories employing child labor. The case has been treated in later decisions (*Brooks* v. *United States,* 267 U. S. 432; *Ky. Whip & Collar Co.* v. *I. C. R. Co.,* 299 U. S. 334) as holding the Child Labor Act invalid "because it was not really a regulation of interstate commerce but a Congressional attempt to regulate labor in the state of origin, by an embargo upon its external trade." Since in the act here under consideration Congress is not controlling production, but regulating interstate commerce in order to further orderly marketing and insure reasonable

ces in such commerce itself (see pp. 86–88, *ra*), the same comment cannot legitimately be de. For this reason *Hammer* v. *Dagenhart* is tinguishable.

But we do not believe that in any real sense Child Labor Act was a mere regulation of or in the States. The statute in terms pro- ited interstate shipments; it thus regulated in- state commerce itself, and nothing else. Four tices of this Court thought at the time that h a statute was a regulation of interstate com- ce within the meaning of the Constitution. believe that they were correct, and that their ws have been given effect by the Court in sub- uent decisions. *Brooks* v. *United States,* 267 S. 432; *Ky. Whip & Collar Co.* v. *I. C. R. Co.,* U. S. 334; cf. *Labor Board* v. *Jones & Laughlin,* U. S. 1.

The majority of the Court in *Hammer* v. *Dagen- t* advanced a number of reasons why the prohi- on of the interstate transportation of child-made ds was not a regulation of interstate commerce. will consider each in turn.

1) The majority stated that Congres did not e the power to prohibit the interstate movement "ordinary" or "harmless" commodities (pp. -272). A similar contention was held "inad- sable" in *Ky. Whip & Collar Co.* v. *I. C. R. Co.,* U. S. 334, 347–348, and since it is inconsistent

with that case as well as others, we can assume that to that extent *Hammer* v. *Dagenhart* is no longer law.

(2) As a corollary to the argument just considered, the opinion suggested that the power to restrict interstate transportation may be exercised only when necessary to avoid "the accomplishment of harmful results" (p. 271), and that the Child Labor Act can not be deemed to fall within that category. This argument appears to be no more than a restatement of the first; it is clear from the opinion that only "harmful commodities" (such as impure food, lottery tickets, liquor, and women) were considered capable of producing "harmful results." The opinion does not find that the use of child labor and dissemination of its effect through the channels of interstate commerce is not an evil, but rather suggests the contrary (p. 275). Thus the decision could hardly have been justified if the phrase "harmful results" had been given its ordinary or natural meaning. Accordingly, even if the "harmful result" limitation be read into the commerce clause—and we submit that the Constitution does not permit of that construction—the ruling of the Court was not warranted. This Court has so held with respect to a strictly comparable evil—the use of prison labor. Cf. *Ky. Whip & Collar Co.* v. *I. C. R. Co., supra.*

(3) The opinion holds that Congress may not "control interstate commerce" in order to prevent "unfair competition" between manufacturers in

tes with different standards of labor (p. 273). ce there can be no question as to the general er of Congress to prevent unfair competition nterstate commerce, the rationale of the opinion t either be that the use of cheap child labor d not be declared unfair, or that an unfair prac- occurring during the course of the production goods to be shipped into interstate commerce d not be subjected to the commerce power no ter how great its effect upon interstate compe- n. The opinion does not seek to establish the of these propositions; and the second is incon- ent with the doctrine that Congress may protect rstate commerce against injury "no matter t the source of the dangers which threaten it." *nd Employers' Liability Cases,* 223 U. S. 1. 51; *or Board* v. *Jones & Laughlin,* 301 U. S. 37. s principle has been applied not only to labor tions in productive industry (*Santa Cruz Co. Labor Board, supra*), but also and more fre- ntly to intrastate acts which give an advantage interstate competition to persons engaged in ctices regarded by Congress as unfair or other- against public policy (*Swift and Company Inited States,* 196 U. S. 375; *United States* v. *en,* 226 U. S. 525; *Northern Securities Co.* v. *ted States,* 193 U. S. 197; *Coronado Co.* v. *M. Workers,* 268 U. S. 295; *Stafford* v. *Wallace,* U. S. 495; *Van Camp & Sons* v. *Am. Can Co.,* U. S. 245; *American Can Co.* v. *Ladoga Can- Co.,* 44 F. (2d) 763, certiorari denied, 282 U. S.

899.[as] Cf. *Houston & Texas Ry.* v. *United States*, 234 U. S. 342.

(4) The opinion in *Hammer* v. *Dagenhart* holds that "a statute must be judged by its natural and reasonable effect" (p. 275), and that since the prohibition against interstate shipment of child-made goods necessarily affected child labor it was not a regulation of interstate commerce. We have pointed out above (*supra*, pp. 67–73) that the constitutionality of a regulatory statute is to be determined by what it regulates, not by what it affects. We will say no more about this question here. We believe that the dissenting opinion clearly reveals the unsoundness of the ruling of the majority, and now represents the law of the Court.

(5) The majority further holds that the regulation of labor conditions in manufacturing enterprise is a purely local matter, that accordingly it falls within the power reserved to the States, and that the Tenth Amendment precludes Congress from regulating interstate commerce so as to invade that field. The Labor Board cases, establish-

[as] The *Ladoga Canning* case permitted a packing company to recover triple damages under Sections 2 and 4 of the Clayton Act because the defendant manufacturer sold cans to a packing company, a competitor of the plaintiff, at discriminatory prices. The court upheld this application of the statute although over 99% of the sales of the defendant to the favored concern were intrastate (see p. 770), upon the ground that the price discrimination in the intrastate sales of cans affected interstate commerce in the goods manufactured therefrom.

ing that Congress may regulate labor relations in industry when they directly affect interstate commerce, are inconsistent with the premise of this argument. Moreover, the Child Labor Act did not regulate intrastate transactions affecting interstate commerce, but regulated interstate transportation itself. The opinion thus seems to hold that an exercise of the commerce power may invade the reserved rights of the States under the Tenth Amendment. Since that Amendment reserves to the States only the powers not granted to Congress, such a construction would be contrary to its plain terms.[66] This subject is considered more fully below, *infra*, pp. 120–138.

None of the reasons advanced in support of the decision in *Hammer* v. *Dagenhart* has a sound basis.[67] The effect of the decision was to establish a limitation upon the commerce power which is contained nowhere in the Constitution, and is contrary to the nature of the grant as defined in cases running from *Gibbons* v. *Ogden*, 9 Wheat. 1, 196,

[66] The majority opinion seems to amend the Tenth Amendment by inserting therein the word "expressly" (p. 275); the Court states that "the powers not expressly delegated to the national government are reserved" to the States and to the people. That the word "expressly" was intentionally omitted from the Amendment is shown by its history. See p. 125, *infra;* Story, *Commentaries*, Sections 1907–1908.

[67] If necessary, it would not be difficult to show that a statute designed to eliminate competitive advantages resulting from the use of child labor on commodities competing in interstate commerce had a legitimate "commerce purpose."

to the most recent decisions of this Court. *Ky. Whip & Collar Co.* v. *I. C. R. Co., supra; U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 147; *Currin* v. *Wallace, supra.* The decision in *Hammer* v. *Dagenhart* created a no-man's land in which neither State nor Nation could function—just as would a holding in the instant case that Congress may not regulate the marketing of agricultural commodities in interstate commerce. The states are precluded by the commerce clause itself from prohibiting interstate shipment of child-made goods. Cf. *Leisy* v. *Hardin*, 135 U. S. 100. Under the decision in *Hammer* v. *Dagenhart* the power thus lost to the States did not pass to the Nation. The establishment of such a hiatus in governmental power is plainly contrary both to the letter and spirit of the Constitution. Story, *Commentaries*, Section 282; *Carter* v. *Carter Coal Co.* 298 U. S. 238, 326 (dissenting opinion of Mr. Justice Cardozo).

For these reasons it is respectfully submitted that this Court has abandoned the principles which governed the unfortunate decision of a bare majority of this Court in *Hammer* v. *Dagenhart* and that that case may no longer be regarded as an authority.

D. CONCLUSION

In *The Minnesota Rate Cases*, 230 U. S. 352, 398, quoting from *Gibbons* v. *Ogden*, 9 Wheat. 1,

195,[68] this Court declared with respect to the line of demarcation between federal and state power under the commerce clause:

> * * * The words "among the several States" distinguish between the commerce which concerns more States than one and that commerce which is confined within one State and does not affect other States. "The genius and character of the whole government," said Chief Justice Marshall, "seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. * * *"

Under this classical definition of the scope of the commerce clause, there can be no doubt as to the power of the federal government to deal with such major national economic problems as those which have long confronted American agriculture.

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[68] See also *Mayor of New York* v. *Miln*, 11 Pet. 102, 146; *The Daniel Ball*, 10 Wall. 557, 564; *Kidd* v. *Pearson*, 128 U. S. 1, 17; *Champion* v. *Ames*, 188 U. S. 321, 346; *Employer's Liability Cases*, 207 U. S. 463, 493, 507 (both majority and dissenting opinions). See Stern, *That Commerce which Concerns more States Than One*, 47 Harv. L. Rev. 1335.

II

THE MARKETING QUOTA PROVISIONS OF THE AGRICULTURAL ADJUSTMENT ACT DO NOT VIOLATE THE TENTH AMENDMENT

It has been shown that the marketing quota provisions of the Agricultural Adjustment Act are an exercise of the power of Congress to regulate interstate and foreign commerce. This disposes of appellants' argument that the Act violates the Tenth Amendment, which merely provides that:

> * * * The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Language could not express more clearly the thought that the Amendment does not reserve to the states any part of any power which is "delegated to the United States by the Constitution," nor indicate more plainly that the Amendment does not limit the scope of any power which is delegated to the United States. The Amendment has no independent operation. It comes into effect only after a determination that an Act of Congress is not authorized under the granted powers.

These propositions seem self-evident. But several relatively recent decisions of this Court are susceptible of being interpreted as giving the Amendment greater sweep than its language permits. Under these circumstances we deem it proper to call to the Court's attention both the

storical facts surrounding the adoption of the mendment and the long line of cases in which it s been construed as meaning only what it says.

THE HISTORY OF THE ADOPTION OF THE TENTH AMENDMENT

The first ten amendments are a close adaptation those proposed by Massachusetts in ratifying the onstitution.[69] At that time four States had rati-d. The opposition was strong and becoming in-easingly vocal in the states yet to act. The omis-on of a bill of rights was generally regarded as e most vulnerable point in the proposed charter.[70] ohn Hancock, president of the Massachusetts Con-ntion, accordingly introduced the proposed nendments "in order to remove the doubts and iet the apprehensions of gentlemen" (Elliot's ebates, II, 123). John Adams welcomed the pro-sal with enthusiasm; it would allay doubts, con-iate opposition, and serve to ease the path of rati-ation in the eight states which had not acted. illman considered them "peace-makers" (Elliot, , 123–124, 169). These predictions were fulfilled. outh Carolina, New Hampshire, Virginia, and ew York each ratified the Constitution but ex-essed their earnest hope for amendments; only

[69] The first of the nine recommendations of Massachusetts d: "That it be explicitly declared that all powers not ex-ssly delegated by the aforesaid Constitution are reserved the several states, to be by them exercised" (Elliot's De-es, I, 322).

[70] Warren, *The Making of the Constitution*, p. 769.

the North Carolina convention insisted upon amendments prior to ratification.[71]

The discussion in the ratifying convention confirms the plain meaning of the words of the Tenth Amendment, and indicates that the proponents wished merely to insure that the central government would be one of delegated powers. In Massachusetts Adams stated that the proposed amendment "removes a doubt which many have entertained" and made sure that "if any law made by the federal government shall be extended beyond the power granted by the proposed Constitution," it would be held unconstitutional (Elliot's Debates, II, 131). Jarvis agreed as to the desirability of the proposal, to "remove every doubt on this head" (*id.*, II, 153). In Virginia, Grayson thought, since there was a similar clause in the Articles of Confederation, it could not be "totally unnecessary" (*id.*, III, 449). Mason agreed, since the amendment would "remove our apprehensions" (*id.*, III, 442). Bloodworth, in North Carolina, urged the amendment because "every possible precaution

[71] Elliot's Debates, I, 325–332. It may be noted that only in Massachusetts and New Hampshire was the Tenth Amendment offered as an amendment (Elliot, I, 322, 326); in South Carolina, Virginia, and New York it was set forth as declaratory of the conventions' understanding of the construction of the Constitution (*id.*, I, 325, 327). Maryland ratified without attaching proposed amendments, but its convention addressed a statement to the people of that State, explaining that the Constitution was "very defective," and recommending various amendments, including one similar to the Tenth Amendment (*id.*, II, 547, 550).

should be taken when we grant powers" (*id.*, IV, 167). The delegates who opposed the amendment did so largely on the ground that it was unnecessary, if not dangerous.[72]

The anxiety for this declaratory rule of construction may be traced to two fears: that the national government might assert the right to exercise powers not granted, and that the states would be unable fully to exercise the powers which the Constitution had not taken from them. The first fear may be exemplified by Bloodworth of North Carolina, who warned that "without the most express restrictions, Congress may trample on your rights" (Elliott, IV, 167). So, too, Patrick Henry inveighed against the surrender of powers to the national government "without check, limitation, or control" (*id.*, III, 446). But perhaps the most frequently expressed purpose was to insure that the states should continue able to exercise the numerous powers which had *not* been granted to Congress. Grayson of Virginia "thought it questionable whether rights not given up were reserved" (*id.*, III, 449). Henry of Virginia thought ratification of the unamended constitution "the most absurd thing to mankind that ever the world saw—a government that has abandoned all its powers" (*id.*,

[72] Massachusetts: Varnum (Elliot, II, 78); Virginia: Nicholas, Randolph and Madison (*id.*, III, 450, 464, 600, 620, 626); North Carolina: Maclaine and Iredell (*id.*, IV, 140, 149); South Carolina: Pinckney (*id.*, IV, 315–316); Pennsylvania: Wilson and M'Kean (*id.*, II, 435–436, 540).

III, 446). Mason of Virginia asked, "I there any thing in this Constitution which secures to the states the powers which are said to be retained?" (*id.*, III, 441)."[13]

When the proposed amendments were introduced by Madison in the first Congress, "to give satisfaction to the doubting part of our fellow-citizens" (1 Annals of Congress 432), he viewed the Tenth Amendment as merely declaratory (1 Annals 441):

> I find, from looking into the amendments proposed by the State conventions, that several are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several States. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it.

There was no other explanatory statement in the briefly recorded debate on this Amendment. But Madison in the course of debate on Hamilton's bank proposal, on February 2, 1791, when nine states had ratified the amendments which he had proposed, said (2 Annals 1897):

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[13] For the possible convenience of the Court, citations to additional discussion of the proposals which became the Tenth Amendment are: Elliot's Debates, II, 153, 540; III, 464, 588, 589, 622.

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.

Finally, any possibility of doubt must be removed when it is remembered that the adoption of the Tenth Amendment was accompanied by a deliberate refusal to reserve to the states all powers not "expressly" granted to the national government. This was the wording of Article II of the Articles of Confederation,[74] of the Massachusetts [75] and New Hampshire [76] proposals, of the South Carolina declaration,[77] and of the Maryland convention's statement to its electors.[78] New York referred to powers

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[74] "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States * * *"

[75] See footnote 69, *supra*.

[76] "That it be explicitly declared that all powers not expressly and particularly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised" (Elliot, I, 326).

[77] "This Convention doth also declare, that no section or paragraph of the said Constitution warrants a construction that the states do not retain every power not expressly relinquished by them, and vested in the general government of the Union" (*id.*, I, 325).

[78] "That Congress shall exercise no power but what is expressly delegated by this Constitution" (*id.*, II, 550).

"clearly" delegated."[79] Only Virginia, in its declaration, made no such qualification.[80] While Madison's proposals for new amendments were under consideration in Congress, Tucker and Gerry each moved to amend this proposal so as to reserve to the states the powers not *expressly* delegated; each motion was defeated (1 Annals of Congress 761, 767–768). Even the original reservation in the Articles of Confederation of powers not "expressly" delegated, it is to be noted, was intended by the Continental Congress to do no more than to preserve the autonomy of the states.[81] Whether or not a reservation to the states of powers not expressly delegated would have impaired the last clause of Section 8 of Article I, granting "necessary and proper" powers, it is plain that there was a deliberate choice of the Congress to except from the reservation to the states the powers granted to Con-

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[79] "* * * that every power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress * * * remains to the people * * * or to their respective state governments * * *" (*id.*, I, 327).

[80] "* * * that every power not granted thereby remains with them (the people) * * *" (*id.*, I, 327).

[81] Thomas Burke, writing to Governor Caswell from the Congress, on May 23, 1777, said the proposal originally "expressed only a reservation of the power of regulating the internal police, and consequently resigned every other power. It appeared to me that this was not what the States expected, and, I thought, it left it in the power of the future Congress * * * to make their own power as unlimited as they please." Burke accordingly proposed the Article which, after two days of spirited debate, was adopted 11–1, with one state divided. 7 Journals of Cont. Cong. 122–123.

gress by implication. This choice cannot be squared with any argument that appropriate federal powers cannot be exercised because of the operation of the Tenth Amendment.

In summary, the men who proposed the Tenth Amendment seem to have been clear that the Amendment was simply declaratory of the evident proposition that Congress could not constitutionally exercise powers not granted to it, and that these powers could continue to be exercised by the states. It was designed solely to allay extravagant fears such as those of Spencer of North Carolina, who felt that a clause as innocuous as that relating to the election of senators and representatives "strikes at the very existence of the states, and supersedes the necessity of having them at all" (Elliott's Debates, IV, 55). As Story has emphatically said (Story on the Constitution, secs. 1907–1908):

> This amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution. * * *
>
> It is plain, therefore, that it could not have been the intention of the framers of this amendment to give it effect, as an abridgement of any of the powers granted under the Constitution, whether they are express or implied, direct or incidental. Its sole design is to exclude any interpretation by which other powers should be as-

> sumed beyond those which are granted. * * * The attempts then which have been made from time to time to force upon this language an abridging or restrictive influence are utterly unfounded in any just rules of interpreting the words or the sense of the instrument. Stripped of the ingenious disguises in which they are clothed, they are neither more nor less than attempts to foist into the text the word "expressly;" to qualify what is general, and obscure what is clear and defined. * * *

B. THE JUDICIAL HISTORY OF THE AMENDMENT

The plain purpose of the Amendment has been confirmed by more than a century of constitutional history. The decisions of this Court have reiterated that the Tenth Amendment offers no independent limitation upon the powers granted to the United States but merely states the unquestioned principle that the central government is one of enumerated powers.

In 1808 in what, so far as we have been able to discover, is the first federal case interpreting the commerce clause, *United States* v. *The William*, Fed. Cas. No. 16,700, 28 Fed. Cas. 614, (see p. 51, *supra*), Judge Davis [82] stated with respect to the powers of the states that (p. 622):

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[82] Judge Davis (See note 37, p. 51, *supra*) was a delegate to the Massachusetts constitutional convention which first proposed the Tenth Amendment (see p. 121, *supra*). He was thus in a position to know personally what the amendment was intended to mean.

> * * * The general position is incontestible, that all that is not surrendered by the constitution, is retained. The amendment which expresses this, is for greater security; but such would have been the true construction, without the amendment.

The effect of the Tenth Amendment seems to have been considered for the first time by this Court in *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 325, where the Court said the principle, that "the sovereign powers vested in the state governments * * * remained unaltered and unimpaired, except so far as they were granted to the government of the United States," had been "positively recognized" by the amendment. Even Luther Martin, Attorney General of Maryland, arguing in *McCulloch* v. *Maryland,* 4 Wheat. 316, conceded that the amendment meant what it said, that it was "merely declaratory of the sense of the people" and designed to allay an apprehension which the federalists "treated as a dream of distempered jealousy" (4 Wheat., at 372, 374). Chief Justice Marshall's opinion agreed that the amendment "was framed for the purpose of quieting the excessive jealousies which had been excited" and that it left open the question "whether the particular power * * * has been delegated to the one government, or prohibited to the other" (4 Wheat., at 405, 406). Taney, as well, accepted this self-evident proposition. In *Gordon* v. *United States,* 117 U. S. 697, 705 (1864), he said: "The reserva-

tion to the States respectively can only mean the reservation of the rights of sovereignty * * * which they had not parted from."

This Court has continued to treat the Tenth Amendment as containing no limitation on the powers granted to the United States. In the *Lottery Case,* 188 U. S. 321, 357, it brushed aside the suggestion that this Amendment forbade the legislation because "the power to regulate commerce among the States has been expressly delegated to Congress." In *Northern Securities Co.* v. *United States,* 193 U. S. 197, 344–345, the majority opinion refused to entertain argument based on the Tenth Amendment which the defendants "strangely enough" raised; it could not "conceive how it was possible for any one to seriously contend" that the commerce power was limited by the state power to charter corporations.[83] The Court, speaking of the National Prohibition Act, in *Everard's Breweries* v. *Day,* 265 U. S. 545, 558, said "if the act is within the power confided to Congress, the Tenth Amendment, by its very terms, has no application, since it only reserves to the States 'powers not delegated to the United States by the Constitution'." In *Missouri* v. *Holland,* 252 U. S. 416, 432, the Court said that, to answer the question as to the validity of the Migratory Bird Treaty and act in view of the

[83] Only four justices joined in this opinion; the concurring opinion of Justice Brewer seems not to have gone so far. 193 U. S. at 363.

ights reserved to the States, "it is not enough to efer to the Tenth Amendment * * * because * * * the power to make treaties is delegated xpressly * * *." Again, in *United States* v. *Sprague*, 282 U. S. 716, 733, this Court said: "The Tenth Amendment was intended to confirm the nderstanding of the people at the time the Constiution was adopted * * *. It added nothing to he instrument as originally ratified * * *."

These cases show a consistent[*] and express ecognition that the Tenth Amendment means just vhat it says. However, the clarity of these decions has been obscured by several of the recent pinions of this Court. Thus, in *Hopkins Savings* 1ss'n. v. *Cleary*, 296 U. S. 315, the Court held pp. 338–339) that "The destruction of associaions established by a state is not an exercise of ower reasonably necessary for the maintenance by

[*] We are not here concerned with the ebb and flow of the states' rights" doctrine (summarized in Corwin, *The Commerce Power versus States Rights*), but with those cases in vhich the Court has considered the specific application of the Tenth Amendment to powers assumed to have been granted to he national government. *The Collector* v. *Day*, 11 Wall. 113, elies upon the Tenth Amendment, but the decision seems to ave been placed ultimately upon the supposed scope of the ederal taxing power. In *Kansas* v. *Colorado*, 206 U. S. 46, 0–90, the Court rejected the argument of the United States nat powers not delegated to it could be exercised if they ere beyond the competence of the states: the Tenth Amendent, "seemingly adopted with a prescience of just such contion," made "absolutely certain" that the national governent should not "attempt to exercise powers which had not een granted."

the central government of other associations created by itself in furtherance of kindred aims." This seems to be a construction of federal powers; as such there need be no quarrel with it. But the opinion appears to view this conclusion as based upon the Tenth Amendment, independently of the scope of the powers granted to the United States (pp. 335, 336). In *United States* v. *Butler*, 297 U. S. 1, the Court held that the Agricultural Adjustment Act tax was not a true tax, because the proceeds were earmarked for benefit contracts (p. 61), and that the payments to farmers were not merely expenditures under the general welfare clause, because they were coupled with coercive conditions in effect regulating agricultural production (pp. 71, 73). The opinion, however, seems further to decide that, "wholly apart 'from the scope of the general welfare clause,' the act invades the reserved rights of the states" (p. 68). Similarly, in *Ashton* v. *Cameron County Dist.*, 298 U. S. 513, 527, the Court held Chapter IX of the Bankruptcy Act invalid, not because the bankruptcy power did not extend to the public debtors there specified, but because, if the Act were sustained, "the sovereignty of the State, so often declared necessary to the federal system, does not exist" (p. 531).[85] Indeed, the

[85] The decision is not in terms placed upon the Tenth Amendment. But its analysis seems basically similar to the other cases, in that the scope of the federal power was considered largely irrelevant and the validity of the Act was judged solely on the basis of the powers taken to be reserved to the States.

opinion assumes "that the enactment is adequately related to the general 'subject of bankruptcies'" (p. 527). But cf. *United States* v. *Bekins*, 304 U. S. 27. Finally, in *Steward Machine Co.* v. *Davis*, 301 U. S. 548, and *Helvering* v. *Davis*, 301 U. S. 619, the Court sustained Titles IX, VIII, and II of the Social Security Act in opinions which not only held the titles within the powers granted to the federal government but in addition held that they did not violate the Tenth Amendment. The circumstances relied upon to show the latter conclusion might, by the traditional analysis, more appropriately have served to show that the Titles were a valid exercise of the federal power to tax and to spend for the general welfare.[86]

In none of these opinions did the Court explicitly announce a departure from its historic treatment of the Tenth Amendment. The government does not believe that, merely because of implications derived from the form in which these opinions have been cast, so important a constitutional doctrine should be taken to have been overruled *sub silentio*. Particularly is this the case when other, and contemporaneous, decisions retain the accepted interpretation of the Tenth Amendment. In *Ashwander* v. *Valley Authority*, 297 U. S. 288, the Court

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[86] A somewhat similar approach may be indicated in *Cincinnati Soap Co.* v. *U. S.*, 301 U. S. 308, 312, where the Court said, "The Tenth Amendment is without application, since the powers of the several states are not invaded or involved."

refused to consider objections raised under the Tenth Amendment to the sale of power by the Government. It said (pp. 320–331): "To the extent that the power of disposition is thus expressly conferred, it is manifest that the Tenth Amendment is not applicable * * *. The question is as to the scope of the grant and whether there are inherent limitations * * *." In *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, and in *Associated Press* v. *Labor Board,* 301 U. S. 103, the Court, having determined the National Labor Relations Act as applied to be an exercise of the commerce power, found it unnecessary even to discuss the Tenth Amendment despite persistent reliance upon it by counsel and dissenting justices.[87] Similarly, in *Sonzinsky* v. *United States,* 300 U. S. 506, the Court saw no occasion to consider petitioner's argument based on the Tenth Amendment (p. 508), but contented itself with the decision that the firearms tax was an exercise of the taxing power. In *Wright* v. *Union Central Ins. Co.,* 304 U. S. 502, 516, this Court declared at the last term that: "In view of our decision that the law is within the bankruptcy power, scant reliance can be placed on the Tenth Amendment." Finally, in *United States*

[87] The effect of the Tenth Amendment was urged by the dissenting opinion in the *Jones & Laughlin* case (301 U. S. at 97) and by respondents in the *Associated Press* case (301 U. S. at 105), in *Labor Board* v. *Freuhauf Co.,* 301 U. S. 49, 51, and in *Labor Board* v. *Clothing Co.,* 301 U. S. 58, 71.

California, 297 U. S. 175, 184, the Court declared, a slightly different connection, that "the sovergn power of the states is necessarily diminished the extent of the grants of power to the federal vernment."

In none of these recent cases has the Governent presented any detailed analysis of the origin the Tenth Amendment or of the decisions under ; in none has a considered or detailed argument en offered in support of the position contrary that of the Government; in none has the Court pressly considered the basis for its occasional sumption that the Tenth Amendment operates an independent limitation upon the federal owers. Certainly, if this Court is to abandon its aditional position, in apparent disregard of the tention of the framers, the importance of the uestion requires that this choice should not be ade without full discussion.

C. CONCLUSION

The argument of appellants, so far as it is based n the Tenth Amendment, must of necessity begin ith the premise that the power in question is reerved to the states alone and therefore cannot be xercised or affected by the central government. his, it is to be noted, assumes that the scope and xistence of an exclusive state power can be deermined without reference to the federal powers.

This assumption is contradicted by the whole course of our constitutional history. Judgment upon the scope of the federal power cannot fail to be clouded if the issue, in part or in whole, be resolved in advance by the assumption that the same or a related power belongs affirmatively or exclusively to the States. Recognition of the importance of protecting the independence of the States would thus imperceptibly be transmuted into vitiation of powers which have in fact been granted to the Federal Government.

The constitutional grant of federal power is, then, the measure of the power granted—not some hypothetical reservation of a specific power to the states. This principle of constitutional interpretation, which is a part of our dual system of government, is in no way inconsistent with such a system. Thus, the fact that ours is a federated system of government may have a bearing in resolving difficult questions of construction as to the scope of a granted power.

As in the present case, the denial of a specific power to the states should be a weighty factor in determining whether or not the power in question has been granted to the federal government. Still another principle has developed in cases dealing with the scope of the federal taxing power, in which it has been held that the power may not be used so as to destroy or burden the essental in-

strumentalities or activities of the state governments. This doctrine has not been applied to other powers of the Congress. *United States* v. *California,* 297 U. S. 175, 184–185. Indeed, since the Constitution creates a federal government primarily by granting certain plenary powers and withholding others, the doctrine applied in the tax cases must necessarily be an exceptional one.

But this exceptional doctrine, even were it applicable, in no way impairs the basic principle that the question must always be whether or not the power has been granted to the United States. If the powers and rights of the states were made the first inquiry, it would result in an exaggerated form of that "perfect solecism which affirms" that a national government should exist with paramount powers, and yet that in the exercise of those powers it should not be supreme" (Story, *Commentaries,* II, Sec. 1837).

The plain meaning of the language of the Tenth Amendment, the circumstances of its adoption, and a century of constitutional litigation support the approach represented by the *Ashwander* and *Jones & Laughlin* opinions. We respectfully submit that it should be adopted in this case. Any other rule must condemn constitutional interpretation to a perpetual servitude to sophistry and contradiction: neither layman nor scholar can ever be expected to contrive a satisfactory touchstone by which to

determine what powers granted to the national government may not be exercised because reserved to the states as a power "not delegated to the United States."

III

THE MARKETING QUOTA PROVISIONS OF THE AGRICULTURAL ADJUSTMENT ACT DO NOT VIOLATE THE FIFTH AMENDMENT

Appellants argue that the marketing quota provisions of the Act violate the due process clause in the Fifth Amendment (1) because they are vague and indefinite, and (2) because they are retroactive in effect as applied to the 1938 crop, which was planted and harvested before the quotas were established. Appellants do not suggest in their brief or assignment of errors that the Act is arbitrary, capricious or unreasonable (except in the above respects), or is not related to the object sought to be attained. Accordingly, before examining the general question as to the validity of the statute under the due process clause, we shall first consider the two specific objections raised by appellants.

A. THE PROVISIONS OF THE ACT ARE NOT SO VAGUE AND INDEFINITE AS TO VIOLATE DUE PROCESS OF LAW

Appellants contend that the Act is invalid for indefiniteness because farmers cannot tell from the statute itself what their quotas are to be.

Inasmuch as the Act does not penalize farmers for marketing tobacco in violation of the general statutory standards, but only for marketing quantities in excess of specific allotments administratively determined under such standards (Sec. 314), this objection is untenable. The principle that "a penal statute * * * must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties" (*Connally* v. *General Const. Co.*, 269 U. S. 385, 391; *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 242) does not apply to statutory provisions which are implemented by specific administrative regulations.

Any unfairness which may be inherent in a vague penal law results from the inability of a person to tell whether or not he is acting unlawfully, and thus subjecting himself to punishment. When penalties are imposed only for violation of specific administrative orders, persons know when they act precisely what they are forbidden to do, irrespective of how indefinite the grant of authority to the administrative agency may be. The generality of the delegation of power to the administrative body affords no reason for applying the rule against indefinite penal statutes.

In each of the cases in which this Court has held penal laws invalid for indefiniteness, the penalty was imposed for violating the statute, not an ad-

ministrative order issued under it.[88] In *Champlin Rfg. Co.* v. *Commission, supra,* this Court indicated that the objection to vague statutes does not apply to those implemented by definite administrative rulings before penalties are imposed. The Court of Appeals of New York expressly so held in *Long Island R. R. Co.* v. *Dept. of Labor,* 256 N. Y. 498, 514, distinguishing *Connally* v. *General Const. Co., supra,* on this very ground. Cf., also, *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, and *Highland* v. *Russell Car Co.,* 279 U. S. 253, cases involving different sections of the Lever Act.

Appellants' argument confuses the requirements of the due process clause as to definiteness in penal statutes with the test to be applied to legislative action to determine whether the legislative body has abdicated its functions by delegating unfettered authority to administrative agencies. The first relates only to the provisions of a statute or order which itself tells the individual citizen just what he may not do. The second is concerned only with whether any standard has been laid down to guide administrative action. The same definiteness is

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[88] *International Harvester Co.* v. *Kentucky,* 234 U. S. 216; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81; *Small Co.* v. *Sugar Ref. Co.,* 267 U. S. 233; *Connally* v. *General Const. Co.,* 269 U. S. 385; *Cline* v. *Frink Dairy Co.,* 274 U. S. 445; *Smith* v. *Cahoon,* 283 U. S. 556; *Champlin Ref. Co.* v. *Commission,* 286 U. S. 210 *Herndon* v. *Lowry,* 301 U. S. 242.

plainly not required in the two situations. General grants of authority to administrative bodies have uniformly been upheld so long as an intelligible policy to guide the administrative agency has been established (see pp. 170–175, *infra*). That this Act does not contain an invalid delegation of legislative power will be shown below. (See Point IV, *infra*, pp. 160–175)

Here there is no indefiniteness whatsoever as to how much tobacco each farmer may market. This quantity is prescribed in an exact number of pounds by the administrative officials; and not until such a quota had been prescribed could any penalty be imposed, for until such time there would be no quota to exceed. Thus, the claim that the statute violates the Fifth Amendment because of the indefiniteness of the quota provisions is utterly without foundation.

B. APPLICATION OF THE ACT TO THE 1938 TOBACCO CROP DOES NOT VIOLATE THE FIFTH AMENDMENT

Appellants contend that the marketing quotas for the marketing year 1938–1939 were retroactive and accordingly violate due process of law inasmuch as the 1938 crop was planted, grown, and harvested before the quotas were allotted to individual farms. The short answer to this argument is that the Act imposes penalties only for excessive amounts *marketed* after individual quotas are prescribed, not for the quantity produced before that time.

The facts relating to this phase of the case are as follows: The bill which was eventually enacted as the Agricultural Adjustment Act of 1938 provided for the fixing of tobacco marketing quotas in substantially the same terms as those of the Act as it was finally passed. This bill was approved by committees of the House and Senate in November 1937 (S. Rep. 1295, Nov. 22, 1937; H. R. Rep. 1645, Nov. 27, 1937, 75th Cong., 1st Sess.). Appellants began to arrange for the planting of their crop in December 1937, planting the tobacco seedbeds at that time (R. 45). The Act was approved by the President on February 16, 1938. On February 18 the Secretary of Agriculture issued his proclamation that the total supply of tobacco exceeded the reserve supply level (R. 40). On March 12, 1938, a referendum was held, and on March 25 the Secretary proclaimed the result of the referendum approving the fixing of marketing quotas for flue-cured tobacco by a vote of 250,095 to 35,253 (R. 41).

The tobacco was transplanted from the seedbeds beginning in the middle of March (R. 45) and harvested in June and July (R. 46). The tobacco was cured and graded on the farm prior to marketing. The markets in south Georgia and Florida opened about August first (R. 45). On July 22, the Secretary announced the apportionment of the national quota among the states (R. 41), and shortly before

the opening of the markets, notice of the allotment for each farm was given to the individual appellants (R. 45). Thus, although appellants may not have known exactly what their individual marketing quotas would be when they grew the tobacco, they did know what those quotas were before marketing it.

It is thus plain that there was no retroactive operation of the statute in applying it to 1938 marketings. Since the Act was passed five and a half months before the marketing season began, it cannot seriously be urged that the law itself applied retroactively. The substance of appellants' contention is merely that the allotments were retroactive because they were made after the farmers had expended considerable sums in raising the crop. But the quotas apply only to acts occurring after their promulgation—to the marketing of tobacco, not its production—and accordingly do not operate retroactively.

This Court has frequently held that "a statute is not retroactive merely because it draws upon antecedent facts for its operation." *Lewis* v. *Fidelity*, 292 U. S. 559, 571; *Reynolds* v. *United States*, 292 U. S. 443, 449; *Cox* v. *Hart*, 260 U. S. 427, 435; *Mugler* v. *Kansas*, 123 U. S. 623; *In re Rahrer*, 140 U. S. 545, 564; *United States* v. *Freight Ass'n*, 166 U. S. 290; *New York Cent. R. R.* v. *United States*, No. 21, 212 U. S. 500; *Chicago & Alton R. R. v. Tranburger*, 238 U. S. 67; *Jacob Ruppert* v.

Caffey, 251 U. S. 264, 301; *Samuels* v. *McCurdy*, 267 U. S. 188, 193. This statute does not even have such an effect.

In the *New York Central* case, defendant railroad was indicted for paying a rebate contrary to the terms of the Elkins Act. The contract for the rebate had been made and the goods transported in interstate commerce prior to the passage of the Elkins Act; but the rebate was not actually given until after the law was passed. The Court held that since the rebate was given after the passage of the Act, to apply the Act to the rebate was not to give it retroactive operation regardless of when the contract was made or the goods transported.

In many of the above cases the charge was made that application of the statute in question to property rights previously established would cause great financial injury because of expenses previously incurred. The contention that this invalidated the statute (and this is the basis of appellants' claim here) has been uniformly rejected. In *Mugler* v. *Kansas, supra*, a state law prohibiting the manufacture and sale of intoxicating liquor was upheld both as applied to factories lawfully built at great expense and to beer lawfully acquired before the passage of the law—although the investment in such property might be completely destroyed as a result of the statute. In *Ruppert* v. *Caffey, supra*, application of the Volstead Act to beer on hand at the time of passage of the law was sustained, although the value of the property was

thus destroyed. Cf. *In re Rahrer, supra.* In *Samuels* v. *McCurdy, supra,* a state statute prohibiting the possession of intoxicating liquors was held constitutionally applicable to liquor possessed before the statute was passed, although the value of the liquor was thus destroyed. In *Chicago & Alton R. R.* v. *Tranbarger,* 238 U. S. 67, a statute imposing penalties upon a railroad for failure to maintain openings through its road-bed for drainage purposes was held valid as applied to an embankment lawfully built without such openings before the passage of the Act.

These principles have been applied repeatedly in upholding the application of statutes to previously existing continuing contracts. *Norman* v. *B. & O. R. Co.,* 294 U. S. 240, 306; *Holyoke Power Co.* v. *Paper Co.,* 300 U. S. 324; *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467; *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211; Phila., *Balt. & Wash. R. R.* v. *Schubert,* 224 U. S. 603. In the *Norman* case the Court said (pp. 307–310):

> This argument is in the teeth of another established principle. Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of

dominant constitutional power by making contracts about them.

* * * * *

* * * There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt. * * * The power of the Congress in regulating interstate commerce was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. The reason is manifest. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place to this extent the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of the Congress so much of the field as they might choose by "prophetic discernment" to bring within the range of their agreements. The Constitution recognizes no such limitation.

Appellants here are not even deprived of any contract rights by the regulation in question. No contracts to sell tobacco subsequently grown are shown to have been in effect before the law was passed or the allotments made. Nor are they deprived of any physical property. At most the statute takes from them an expectation that all of the crop planted and harvested could be sold, an expec-

tation upon which they had based certain expenditures. But such an expectation is not entitled even to the protection of a contract right. As the Court declared in the *Holyoke Water Power* case, *supra* (300 U. S., at 341):

> * * * But the *disappointment of expectations* and even the frustration of contracts may be a lawful exercise of power when expectation and contract are in conflict with the public welfare. "Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity." *Norman* v. *Baltimore & Ohio R. Co., supra,* pp. 307, 308. [Italics supplied.]

The loss of the right to sell tobacco after legally producing it is precisely the same in kind as the loss of the right to sell beer after legally acquiring it involved in the *Mugler, Rahrer,* and *Ruppert* cases. Such distinction as there may be between the two situations is one of degree. In the latter cases the loss of the value of the factories or the property concerned was total, and, as far as the statute was concerned, final; here it is only fifty *percent* of the value of such part of the excess as the farmers may choose to market. Moreover, the reasonable expectation of Congress was that not only would the reduction in the amount marketed increase the total return to growers for the tobacco sold but that the growers could, if they should

choose, make fully adequate provision for retaining any excess for later sale either within a later quota or free of quota restriction. See p. 64, *infra.*

There is peculiar appropriateness in applying the principle that a Federal regulation of commerce may validly disappoint an expectation, where as in this case, the regulation is designed to increase—and apparently has increased—the total value of the crop sold by an amount far exceeding the amount of any penalties paid. The record shows that as compared with all former years, despite the penalties paid for excess marketings, the return to farmers in Georgia and Florida for their 1938 crop was greater by almost two million five hundred thousand dollars than the return they had received for any previous crop. The value of the crop to the growers in those states was approximately $21,700,000 in 1938 (R. 46); it was $18,898,000 in the next best year, 1936, and in 1937 $17,469,000.[89] The average price in 1938, 20.3¢ per pound,

[89] The following table compares the figures for Georgia and Florida between 1928 and 1937 as computed from Table 2c (R. 55), with the figures for 1938 as shown at and computed from R. 46:

Year	Production	Price per pound	Farm value
	1,000 pounds	*Cents*	*1,000 dollars*
1928	87,329	12.8	11,189
1929	93,006	18.4	17,098
1930	109,071	9.9	10,827
1931	63,280	6.4	4,050
1932	13,275	10.5	1,388
1933	60,946	11.3	6,913
1934	34,970	18.8	6,584
1935	76,600	18.2	13,927
1936	89,550	21.1	18,898
1937	88,047	19.8	17,469
1938	107,000	20.3	21,730

was higher than that in any previous year, except 1936. And these favorable consequences were not achieved by any drastic curtailment of the amount produced. On the contrary, the total crop amounted to 107 million pounds. This greatly exceeded the amount marketed in Georgia and Florida in any previous year, except 1930 and in that year a crop of 109 million pounds brought the Georgia and Florida growers over ten million dollars less than the value of their 1938 crop. Even after the penalties of $374,000 (R. 46) paid by growers in the area because of excess marketings are subtracted from the value of the crop to the farmers, the amount they received in 1938 remains substantially higher than that received in any previous year. We think it not unfair to assume that the program of which appellants complain was in large part responsible for these increased returns to the growers. The price for the 1938 crop was enhanced not only because of the existence of a national marketing quota in that year but also because of buyers' knowledge that the Act might prevent prices paid in 1938 from causing excessive marketings in subsequent years (see pp. 34–35, *supra*).

It seems plainly evident that the marketing restrictions applied in 1938 not only did not result in loss to the growers, but brought them increases in the returns from their tobacco crop far exceeding the amount of any penalties they paid. It requires considerable hardihood to contend that such a consequence should be regarded

as depriving them of property without due process of law.

Appellants attempt to avoid the application of these principles by asserting that the Act really regulates production and not marketing. They endeavor to support this position by insisting that regulation of marketing necessarily affects the amount produced. In answer to the suggestion that the growers might store the tobacco produced in excess of marketing quotas for sale in the future (and this was expressly contemplated by Congress, see pp. 63–64, *supra*), they urge that this is impossible in the absence of redrying plants, that such plants can only be made use of by cooperative marketing associations, and that there are no such associations in Georgia or Florida.[90]

That any effect which a regulation of the amount marketed may have upon the amount produced does not convert it into a regulation of production has already been shown (*supra*, pp. 67–73). Particularly must this be true when any such effect would come about only because the growers in a particular area might not see fit to avoid any necessity of reducing production by arranging for cooperative redrying and storing of any excess they may produce.[91]

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[90] In Maryland, Virginia, Kentucky, Tennessee, and Wisconsin cooperative associations of tobacco growers are functioning (R. 89–90).

[91] The growers knew long before marketing their tobacco that quotas would be effective (see p. 142, *supra*). Without

Even if the quotas had applied to production rather than marketing and were therefore "retroactive," they would not for that reason be invalid. When production began, the growers knew that a statute which might limit the amount to be marketed was likely to pass, and shortly thereafter the law was passed and the national marketing quota proclaimed. Although the exact quota for each farm was not yet determined, every farmer was necessarily forewarned that an allotment restricting his marketings was to be made. Under such circumstances the absence of precise demarcation of individual quotas at the time of planting the crop would not make the statute arbitrary or unreasonable.[92] If the Act were to be regarded as limiting production, the situation would be analogous to that considered in *Milliken* v. *United*

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adjusting their production in any degree whatever they could have provided, through cooperative marketing, fully effective facilities for redrying any excess and storing it for future sale (R. 56). Such cooperatives had not been successful largely because they attempted to control marketing in addition to providing facilities for redrying and storage (R. 88). The prospect that quotas would control marketing whenever supplies might grow too large would tend to protect such efforts against the principal cause of previous failures.

[92] As Judge Sibley pointed out below: "Had the quotas been fixed in December, as hereafter they will be, many producers would have produced an excess anyhow, the season having been unusually favorable. That chance always must exist" (R. 186).

States, 283 U. S. 15, and *United States* v. *Hudson,* 299 U. S. 498, in each of which the Court held that retroactive application of a statute to transactions occurring after persons were forewarned as to the imminence of future regulation was not unreasonable. In the *Milliken* case an increase in the rate of the applicable tax two years after the making of a gift in contemplation of death was sustained, inasmuch as the testator was left "in no uncertainty" at the time of the transfer that the transaction was to be taxable; he was regarded as "taking his chances of any increase in the tax burden," 283 U. S., at 23. The farmers here who made expenditures with knowledge that a restrictive program was to become effective must also be regarded as taking their chances as to the precise amounts of their individual allotments.

C. THE MARKETING QUOTA PROVISIONS ARE NOT UNREASONABLE, ARBITRARY, CAPRICIOUS, OR UNRELATED TO A LEGITIMATE OBJECT OF CONGRESSIONAL ACTION [93]

In *Nebbia* v. *New York,* 291 U. S. 502, 525, this Court defined the scope of the limitations imposed

[93] We assume in the following argument that the provision in the Fifth Amendment that persons may not be deprived of life, liberty, or property without due process of law gives the courts power to look into the substantive reasonableness or unreasonableness of Congressional regulation. Since this statute plainly does not violate due process, however broadly the Fifth Amendment be interpreted, it is not necessary here to consider whether or not such a construction—first announced many years after the adoption of the Amendment in 1791—is historically accurate or otherwise justified.

by the due process clause in the Fifth and Fourteenth Amendments as follows:

> The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. * * *

In *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 391, the Court asserted with respect to the liberty protected by the due-process clause:

> * * * The Constitution * * * speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and *welfare* of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted

in the interests of the community is due process. [Italics supplied.]

The ends which Congress was seeking to attain in the Act here under consideration were the maintenance of a balanced supply of farm products marketed in interstate and foreign commerce and the protection of farmers against unreasonably low prices. We have shown that it was entirely proper for Congress to exercise its commerce power to accomplish such ends. See pp. 86–96, *supra*.

There can be no question that the provisions of the Act constitute appropriate means of achieving these objectives. In order to prevent excessive marketing, the Act limits the amount which may be marketed. A more direct relationship between means and object would be difficult to find. Under these circumstances, as this Court declared in *Virginian Ry.* v. *Federation,* 300 U. S. 515, 558, "it is evident that where, as here, the means chosen are appropriate to the permissible end, there is little scope for the operation of the due process clause."

In view of what has already been said in the Statement, *supra,* pp. 21–38, and Point I, *supra,* pp. 100–103, with respect to the facts in the tobacco industry, it is not necessary to repeat that description of the industry here. It is evident from the record that tobacco prices had been depressed by 1932 to ruinously low levels. It should be suf-

ficient to point out that the amount received by the growers of flue-cured tobacco had decreased from an average of $137,000,000 from 1926 through 1929 to $56,000,000 in 1931 and $43,000,000 in 1932 (R. 84). This drastic reduction in price was not merely the result of the impact of the general depression upon the tobacco industry, since in the same period the profits available for dividends of the chief tobacco manufacturers increased from an average of $76,000,000 to $104,000,000 (R. 84).

When the 1933 marketing season opened, prices were even lower than in 1932 (R. 78). This resulted in the cessation of all marketing operations and the negotiation of a marketing agreement. See pp. 36–37, *supra*.

This agreement raised the average price from below 11.6¢ (the preceding year's average) to a minimum of 17¢ (R. 78). During the period since 1933 prices have been at levels favorable to the growers. "Prices were influenced by the operation and prospective operation of governmental programs regulating the production or marketing of tobacco" (R. 78). Except for the year 1934,[94] prices during that period have been relatively stable, averaging from 20¢ to 23¢ a pound (R. 79). These facts indicate that conditions in the flue-cured tobacco industry before the adoption of the original agricultural program called for remedial

[94] In 1934 production was abnormally low (R. 53), and the price correspondingly high (R. 79).

action not only to stabilize the prices of tobacco in interstate and foreign commerce but to preserve such commerce itself; they also show that Congress was not unreasonable in assuming that a program for the limitation of marketing in years of excessive supply would stabilize prices—interstate prices—at reasonable levels.

The validity of the Act under the due process clause is supported by other considerations than those just set forth. This Court has frequently declared that the police power embraces regulation designed to "promote the public convenience or the general prosperity." *C., B. & Q. Railway* v. *Drainage,* 200 U. S. 561, 592; *Eubank* v. *Richmond,* 226 U. S. 137, 142; *Sligh* v. *Kirkwood,* 237 U. S. 52, 59. Since Congress may exercise "the police power, for the benefit of the public, within the field of interstate commerce" (*Brooks* v. *United States,* 267 U. S. 432, 437; *Ky. Whip & Collar Co.* v. *I. C. R. Co.,* 299 U. S. 334, 347), it may, within that field, legislate for the "general prosperity" or the "public welfare." This was expressly recognized in the passage from the *Nebbia* case quoted above, wherein it was stated that "the Fifth Amendment in the field of federal activity" does "not prohibit governmental regulation for the public welfare." *Nebbia* v. *New York, supra.*

The plight of the tobacco growers was, of course, only typical of that of farmers generally. The Agricultural Adjustment Act of 1938, like the

statutes which preceded it, was enacted because of the problem presented with increasing intensity since 1922 with respect to the existence of continuing surpluses of agricultural commodities. These surpluses were in large part caused by the restoration of European agriculture after the war and the erection of trade barriers in European nations—following the example of this country—aimed at protecting their domestic agriculture and restricting the use of foreign products.[95] These policies of economic nationalism simultaneously expanded agricultural production abroad and contracted the outlets for American farm products. As early as 1925 Congress was concerned about "the existing depression in agriculture." Hoch-Smith Resolution of January 30, 1925, 43 Stat. 801; *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, 665.

Thus, even before 1929 farm prices and farmers' income had begun to decline[96] and the American farm problem had become acute. The annual reports of the Secretaries of Agriculture from 1922 on emphasized the necessity of avoiding the continued agricultural surpluses if the farm problem was to be solved.[97] The onset of the depression in

[95] See *World Trade Barriers in Relation to American Agriculture*, Senate Doc. No. 70, 73rd Cong., 1st Sess.

[96] See *Facts Relating to the Agricultural Situation*, U. S. Dept. of Agric., May 1932.

[97] See Report of the Secretary of Agriculture, 1922, pp. 2-4; 1923, pp. 4, 6, 7, 13, 19; 1924, p. 21; 1925, p. 14; 1926, pp. 1-2, 4; 1927, p. 19; 1928, pp. 27, 28; 1929, p. 19; 1930, pp. 11, 25, 28, 29, 30; 1931, pp. 6, 10, 13.

1929 and the resultant diminution in domestic buying power greatly aggravated the situation. Surplus stocks accumulated more rapidly [98] and prices drastically declined.[99] By 1933 there was an irresistible demand for federal legislation to alleviate the plight of the farmers.[1]

The first Agricultural Adjustment Act, enacted in May 1933, was designed to limit agricultural surpluses through the payment of benefits to farmers who would reduce the amount produced. The plan adopted in 1938 was designed to meet both the contingencies of surplus and of shortage [2] by restricting marketings, rather than production, in years of excessive supply. The amount produced in excess of the quantity to be marketed in years of

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[98] See Ezekiel and Bean, *Economic Bases for the Agricultural Adjustment Act* (U. S. Dept. of Agric., 1933, p. 19).

[99] Whereas the wholesale prices of all commodities declined 37.3 *per cent* between 1929 and 1933, prices received by farmers dropped 64 *per cent*. Ezekiel and Bean, *supra*, at p. 4.

[1] In the preceding paragraphs we have only outlined in briefest form the causes and consequences of the agricultural problem confronting the nation since the 1920's. The facts thus generally set forth may be said to be of common knowledge and subject to judicial notice. Cf. *Atchison T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248, 260. For more detailed consideration of the problem see Ezekiel and Bean, *supra; World Trade Barriers in Relation to American Agriculture*, Sen. Doc. No. 70, 73rd Cong., 1st Sess; Bean and Chew, *Economic Trends Affecting Agriculture*, U. S. Dept. of Agric., 1933, and the reports referred to at R. 47–49.

[2] The Court may take judicial notice of the droughts which have reduced agricultural production in several recent years.

surplus was to be stored for sale and consumption in other years. (See H. R. Rep. 1645, 75th Cong., 2nd sess., Appendix, p. 208.)

We do not, of course, claim, and it is not incumbent upon the government to show, that this legislation provides a complete panacea for the problems of American agriculture. It is for Congress, not the courts, to decide such questions of policy and wisdom. *Nebbia* v. *New York*, 291 U. S. 502, 537; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 337. The requisites of due process of law are satisfied if the effort to improve the agricultural situation can be said to promote the "general prosperity" or the "public welfare" and if the means adopted by Congress to accomplish these objectives have "some rational basis" in knowledge and experience. Cf. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152. The above brief outline of the problem with which Congress was seeking to deal is sufficient to demonstrate that this statute fulfills both of these requirements.

We have up to this point considered the question of due process as if the burden were on the government to show that the Act is not arbitrary or unreasonable. As this Court has frequently recognized, that burden is upon the one attacking the statute. Even without any Congressional findings, facts supporting the reasonableness of a statute will be presumed to exist and facts found by Congress will be accepted by the courts as

true unless affirmatively and clearly disproved. *United States* v. *Carolene Products Co., supra; Metropolitan Co.* v. *Brownell,* 294 U. S. 580, 584, and cases there cited. Here the Act itself and extensive reports contain findings of fact supporting the reasonableness of this legislation. The principles set forth in the above cases are thus clearly applicable. This case differs from the *Carolene* case in that (1) appellants here make no claim that the facts found by Congress are untrue, and (2) instead of disproof, there is here ample affirmative evidence in the record confirming the findings of Congress and the statements in the committee reports.

IV

THE APPLICABLE PROVISIONS OF THE ACT CONTAIN NO UNCONSTITUTIONAL DELEGATION OF POWER

Appellants, though disclaiming any contention that the marketing quotas allotted to them were not established in conformity with the statute, assert that the Act on its face contains an unconstitutional delegation of power. We are confident that examination of the statute will reveal that very few acts of Congress dealing with complex economic problems have gone as far as the present Act in spelling out standards for and limitations upon executive action.

It is apparently not contended that the referendum provision contained in Section 312 (c) con-

tains an invalid delegation to the farmers. Any such argument has been foreclosed by the decision of this Court in *Currin* v. *Wallace, supra.*

We will consider therefore only the standards established as a guide for administrative action in determining whether to fix marketing quotas and what those quotas shall be.

A. WHEN MARKETING QUOTAS ARE TO BE ESTABLISHED

Section 312 (a) of the Act establishes with definiteness the conditions upon which the Secretary shall proclaim a national marketing quota. Whenever, on specified dates,[3] "the Secretary finds that the total supply of tobacco as of the beginning of the marketing year then current exceeds the reserve supply level therefor," he "shall proclaim the amount of such total supply, and * * * a national marketing quota shall be in effect."

The making of such a finding requires the Secretary only to determine and compare the total supply and the reserve supply level. The Act defines total supply as the carry-over as of July first, plus estimated production (Sec. 301 (b) (16) (B)). It defines "reserve supply level" (Sec. 301 (b) (14) (B)) as the normal supply plus five *per cent* thereof. "Normal supply" is defined (Sec. 301 (b) (10) (B)) as 275 *per cent* of a normal year's

[3] The proclamation is to be made by December 1 (Sec. 312 (a)), except that for the year 1938–1939 it is to be made within fifteen days following the date of the enactment of the Act (Sec. 312 (d)).

domestic consumption and 165 *per cent* of a normal year's exports. "Normal year's domestic consumption" (Sec. 301 (b) (11) (B)) and "normal year's exports" (Sec. 301 (b) (12)) are defined to mean the average quantity consumed in the United States and exported during the ten preceding years, adjusted for current trends. Each of these figures can be determined from available statistics kept by the Federal Government, and Section 301 (c) requires the Secretary to use the latest of such statistics in making these determinations.

It is apparent that the Secretary's function in determining whether a national marketing quota is to be established is limited to the finding of facts contained in official statistics and the making of simple computations, in the main arithmetical, therefrom. The room for discretion and judgment in making adjustment for current trends and in estimating the next year's production is slight, since those factors are reasonably predictable in the light of official statistics.

The national marketing quota so proclaimed goes into effect unless in a referendum conducted by the Secretary among the farmers within thirty days of the original proclamation over one-third of those voting oppose the quota. In such case the Secretary is directed to proclaim the result of the referendum, "and the quota shall not be effective thereafter" (Sec. 312 (c)).

The statute declares that the Secretary "shall" provide for the apportionment of the national mar-

keting quota among the states and individual farms (Sec. 313 (a), (b)). Thus, the fixing of a quota for the states and farms follows automatically once a national marketing quota is established. We know of no case in which it has even been suggested that administrative action so circumscribed constitutes an invalid delegation of power.

B. DETERMINATION OF THE AMOUNT OF THE NATIONAL MARKETING QUOTA

Section 312 (a) provides that the Secretary shall "determine and specify" in his proclamation "the amount of the national marketing quota." The amount is to be the total quantity of tobacco which will make available during the marketing year a supply equal to the reserve supply level (Sec. 312 (a)). The Act also provides for minor upward adjustments in the amount so determined. The marketing quota for any state is not to be reduced to a point less than 75 percent of the production in such state for the year 1937 (Sec. 313 (a)). Each state is to be given a minimum allotment equal to the average national yield for the preceding five years of five hundred acres of flue-cured tobacco (Sec. 313 (e)). For the year 1938 the national quota is to be increased an amount sufficient to allow an increase of up to four percent for each state to prevent individual farmers from receiving inadequate allotments in view of past production (Sec. 313 (e)). The total of these adjustments for

1938 raised the national quota for flue-cured tobacco from 705,000,000 to 748,079,000 pounds (R. 42). Since they serve only to increase the quota, they cannot prejudice any grower.[4]

It is plain that the determination of the amount of the national marketing quota also requires only the making of a finding from available statistics and leaves nothing of consequence to administrative discretion.

C. APPORTIONMENT OF THE NATIONAL QUOTA AMONG THE STATES

The standards to be employed by the Secretary in apportioning the national marketing quota among the states are prescribed in Section 313 (a), which reads as follows:

> SEC. 313. (a) The national marketing quota for tobacco established pursuant to the provisions of section 312, less the amount to be allotted under subsection (c) of this section, shall be apportioned by the Secretary among the several States on the basis of the total production of tobacco in each State during the five calendar years immediately preceding the calendar year in which the quota is proclaimed (plus, in applicable years, the normal production on the acreage diverted under previous agricultural adjustment and conservation programs), with such adjustments as are determined to be necessary to make correction for abnormal conditions of

[4] See footnote 7, p. 10.

> production, for small farms, and for trends in production, giving due consideration to seed bed and other plant diseases during such five-year period: *Provided, however*, That to prevent in any case too sharp and sudden reduction in acreage of tobacco production in any State, the marketing quota for flue-cured tobacco for any State for any marketing year shall not be reduced to a point less than 75 per centum of the production of flue-cured tobacco in such State for the year 1937.

The figures for production and diversion under previous programs are readily available for each state. Except for the adjustments for abnormal conditions of production,[5] for small farms, and for trends in production, the determination here too is a mathematical one leaving nothing to discretion. Each state is to be given an allotment proportionate to its share of the total national production during the preceding five years but not less than 75 per cent of the production for the year 1937.

The factors to be considered in making the adjustments call for the exercise of judgment, and thus, are not entirely statistical or mathematical. Nevertheless, they clearly reflect the policy of Congress and constitute "standards within the framework of which the administrative agent is to supply details." *Currin* v. *Wallace, supra.* In most of the cases in which delegation of authority to ad-

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[5] "Seed bed and other plant diseases" are given consideration under this item.

ministrative officers has been upheld, the exercise of judgment has been subjected to restrictions not nearly as narrow as those considered here. Cf. *United States* v. *Grimaud,* 220 U. S. 506; *Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266; *N. Y. Central Securities* v. *U. S.,* 287 U. S. 12; *Avent* v. *United States,* 266 U. S. 127. See also pp. 170-174, *infra.*

D. THE ALLOTMENT OF THE QUOTAS TO THE INDIVIDUAL FARMS

Congress obviously could not be expected to allocate to each of the 190,000 (R. 74) flue-cured tobacco farms its proportion of the State marketing quota. Establishment of a general standard to serve as the guide for administrative action was essential if the power of Congress to fix such quotas was to be exercised at all. Cf. *Hampton & Co.* v. *United States,* 276 U. S. 394, 406. We submit that in defining the limits and objectives of administrative action in apportioning the State quotas Congress has gone as far in curtailing executive discretion as is practicable and that it has fixed standards much more definite and specific than those in many other valid regulatory laws.

The standards established by Congress for allotting flue-cured-tobacco quotas to farms are to be found in Section 313, paragraphs (b), (c), and (e), of the Act. The primary standard for apportioning the State quotas is set forth in Section 313 (b) as follows:

> The Secretary shall provide, through the local committees, for the allotment of the marketing quota for any State among the farms on which tobacco is produced, on the basis of the following: Past marketing of tobacco, making due allowance for drought, flood, hail, other abnormal weather conditions, plant bed, and other diseases; land, labor, and equipment available for the production of tobacco; crop-rotation practices; and the soil and other physical factors affecting the production of tobacco: * * *

The factors which the Secretary is required to take into consideration are plainly those which would be employed by farmers in determining how much tobacco would be marketed from each farm.

This standard is supplemented by provisions made in Section 313, paragraphs (b), (c) and (e), for certain special situations. The only deviation from the primary standard for the apportionment of the state quota is required by Section 313 (b) which provides[6] that "old" tobacco farms shall

[6] This proviso reads as follows:

> * * * *Provided*, That, except for farms on which for the first time in five years tobacco is produced to be marketed in the marketing year for which the quota is effective, the marketing quota for any farm shall not be less than the smaller of either (1) three thousand two hundred pounds, in the case of flue-cured tobacco, and two thousand four hundred pounds, in the case of other kinds of tobacco, or (2) the average tobacco production for the farm during the preceding three years, plus the average normal production of any tobacco acreage diverted under agricultural adjustment and conservation programs during such preceding three years.

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receive a definite minimum quota of 3,200 pounds, or the average production during the three preceding years, whichever is the smaller. This involves a purely mathematical determination and is the only adjustment to be made out of the state quota.

Section 313 (e) provides for increasing 1938 allotments of farms which the Secretary finds have received inadequate allotments in view of past production. Such increases do not come out of the state quota but from an increase in the 1938 national quota sufficient to provide for increases amounting to not more in each state than 4 percent of the state's quota. Such increases are made directly out of this special reserve and cannot reduce the amount any grower's farm receives under the apportionment of the state allotment.[1]

Allotments to "new" tobacco farms, i. e. those producing tobacco for the first time in five years,

[1] This section reads as follows:

> * * * In case of flue-cured tobacco, the national quota for 1938 is increased by a number of pounds required to provide for each State in addition to the State poundage allotment a poundage not in excess of *4 per centum* of the allotment which shall be apportioned in amounts which the Secretary determines to be fair and reasonable to farms in the State receiving allotments under the Agricultural Adjustment Act of 1938 which the Secretary determines are inadequate in view of past production of tobacco, and for each year by a number of pounds sufficient to assure that any State receiving a State poundage allotment of flue-cured tobacco shall receive a minimum State poundage allotment of flue-cured tobacco equal to the average national yield for the preceding five years of five hundred acres of such tobacco.

are not made out of the state allotment but are made out of a poundage, not exceeding 5 percent of the national quota, reserved especially for allotments to new farms and for additional allotments to small farms. Allotments are made to new farms in any state, whether the State has a quota or not, on the basis of the same factors used in the apportionment of the state allotment to old farms, except, of course, that there are no past marketings to be considered; but new farms are to receive no more than 75 percent of the quota for similar old farms (Sec. 313 (c)).[8]

Plainly administrative officers have "no unfettered discretion" in carrying out such a plan. Cf. *Currin* v. *Wallace, supra.* Congress has laid down

[8] Section 313 (c) reads as follows:

> The Secretary shall provide, through local committees, for the allotment of not in excess of 5 per centum of the national marketing quota (1) to farms in any State whether it has a State quota or not on which for the first time in five years tobacco is produced to be marketed in the year for which the quota is effective and (2) for further increase of allotments to small farms pursuant to the proviso in subsection (b) of this section on the basis of the following: Land, labor, and equipment available for the production of tobacco; crop-rotation practices; and the soil and other physical factors affecting the production of tobacco: *Provided*, That farm marketing quotas established pursuant to this subsection for farms on which tobacco is produced for the first time in five years shall not exceed 75 per centum of the farm marketing quotas established pursuant to subsection (b) of this section for farms which are similar with respect to the following: Land, labor, and equipment available for the production of tobacco, crop-rotation practices, and the soil and other physical factors affecting the production of tobacco.

"intelligible principles" to which the administrative agency is directed to conform (cf. *Hampton & Co.* v. *United States*, *supra*), and merely given power "to fill up the details" to those who are to act (cf. *Wayman* v. *Southard*, 10 Wheat. 1, 43).

Appellants' contention is that the statute contains an invalid delegation because no farmer can tell from the Act itself exactly what his quota will be, and because the final determination of the quotas depends upon the exercise of administrative judgment.

It is true, of course, that the determination of farm quotas calls for the exercise of judgment and not merely for mathematical computations. But the same thing may be said of many statutes which have been upheld by this Court, in most of which the delegation of authority was much more sweeping and less circumscribed than in the case at bar.

Most closely in point are cases dealing with the apportionment of coal cars among mines and of rates among railroads under the Interstate Commerce Act. Section 1, paragraph 15, of that Act (41 Stat. 476-477) authorizes the Interstate Commerce Commission in case of emergency "to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interests of the public and the commerce of the people." In *Avent* v. *United States*, 266 U. S. 127, this Court held that

an attack on the constitutionality of this provision did not contain sufficient substance even to warrant the granting of a writ of error. With respect to the adequacy of the above standard, the Court declared that (p. 130):

> The statute confines the power of the Commission to emergencies, and the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed.

Both the provision of the Interstate Commerce Act referred to above and those of the Agricultural Adjustment Act here in question are concerned with apportionment. If the general standards of reasonableness and the public interest are sufficient under the Interstate Commerce Act without any specification of the factors to be considered in applying them, the detailed enumeration in the Agricultural Adjustment Act of the factors to be considered must *a fortiori* be sufficient.

Section 1, paragraph 14 (41 Stat. 476), of the Interstate Commerce Act provides that "the Commission may, * * * establish reasonable rules, regulations, and practices with respect to car service by carriers * * *." In *Assigned Car Cases*, 274 U. S. 564, the Court held that this provision authorized the Commission to determine the method of apportionment of coal cars among the mines. The validity of this delegation, which is

just as broad as that considered in the *Avent* case, was assumed without question, although "reasonableness" is the only standard provided in the statute.[9]

Section 15, paragraph 6, of the Interstate Commerce Act (41 Stat. 486) authorizes the Commission to "prescribe the just, reasonable, and equitable divisions" of rates to be received by carriers. It specifies the factors to be considered by the Commission in making the divisions as follows:

> * * * In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carier to a greater or less proportion than another carrier of the joint rate, fare or charge.

[9] As to the standards used by the Commission in determining the ratings for the mines as a basis for the apportionment, see p. 67, *supra*.

This section was given effect and the validity of these standards was assumed without question in *New England Divisions Case,* 261 U. S. 184. The standards prescribed in the above section of the Interstate Commerce Act and those contained in Section 313 of the Agricultural Adjustment Act are similar in that each consists of a number of factors to be considered by the administrative agency in making an apportionment. In both statutes the exercise of judgment is required; under neither can the allotment be determined merely by mathematical formulae. But the factors to be considered under the Interstate Commerce Act are much more general than those prescribed in the Agricultural Adjustment Act. Prominent among the matters which the Interstate Commerce Commission is to consider are "efficiency," "fair return," "importance to the public," and "any other fact or circumstance which would ordinarily * * * entitle one carrier to a greater or less proportion than another carrier." Each of the elements to be considered in apportioning the tobacco quotas under the Agricultural Adjustment Act has more specific content and meaning and will better serve as a guide to administrative action than any of these.

The standards set forth in the instant Act are also far more definite and precise than those contained in numerous other statutes which have been upheld as constitutional. Cf. *N. Y. Central Securi-*

ties v. *U. S.*, 287 U. S. 12 (in the public interest); *Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266 (public convenience, interest, or necessity); *United States* v. *Chemical Foundation*, 272 U. S. 1 (in the public interest); *Colorado* v. *United States*, 271 U. S. 153, and *Ches. & Ohio Ry.* v. *United States*, 283 U. S. 35 (certificates of public convenience and necessity); *Tagg Bros.* v. *United States*, 280 U. S. 420 (just and reasonable commissions); *Wayman* v. *Southard*, 10 Wheat. 1 (in their discretion deem expedient); *Buttfield* v. *Stranahan*, 192 U. S. 470 (purity, quality, and fitness for consumption); *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge* v. *United States*, 216 U. S. 177; *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194; and *Louisville Bridge Co.* v. *United States*, 242 U. S. 409 (unreasonable obstruction to navigation); *Mahler* v. *Eby*, 264 U. S. 32 (undesirable resident); *McKinley* v. *United States*, 249 U. S. 397 (war powers); *United States* v. *Grimaud*, 220 U. S. 506 (regulation of forest reserves).

This Court has repeatedly "recognized that legislation must often be adapted to conditions involving details with which it is impracticable for the legislation to deal directly," that the Constitution does not deny "to the Congress the necessary resources of flexibility and practicality" which would enable it to lay down policies and establish standards. *Currin* v. *Wallace, supra; Panama Refining*

Co. v. *Ryan,* 293 U. S. 388, 421. "In such cases 'a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.' *Wayman* v. *Southard,* 10 Wheat. 1, 43." *Currin* v. *Wallace, supra.* This Act more than satisfies any criteria ever applied by the courts in determining the validity of legislation authorizing executive action.

The allotting of farm marketing quotas in flue-cured tobacco involves, as the Court stated in the *Panama* case, a consideration of "a host of details with which the national legislature cannot deal directly." The subject matter of the regulation is so complex that the Congressional policy relating to it can be vitalized only through administrative assistance. If Congress was to act at all, it was obviously necessary that it empower those charged with administering the Act to make "subordinate rules within prescribed limits and to find the facts in the many individual cases to which the regulation was intended to apply." Only through such assistance could the power exercised by Congress be effectively executed. It is submitted that the Secretary's role in furnishing this necessary administrative assistance is one required by the nature of the legislative process, and that the purposes of his action and the limits within which he may act are set out in this statute with far greater particularity than in many acts already held to contain valid delegations of authority.

CONCLUSION

The provisions of the Agricultural Adjustment Act for the establishment of the marketing quotas for flue-cured tobacco are a constitutional exercise of the power of Congress to regulate interstate and foreign commerce. They neither contain any unconstitutional delegation by Congress of its legislative power nor deprive the appellants of liberty or property in violation of the Fifth Amendment to the Constitution. The judgment of the court below should be affirmed.

Respectfully submitted.

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MARCH 1939.

APPENDIX

A. Provisions of the Act

AN ACT

To provide for the conservation of national soil resources and to provide an adequate and balanced flow of agricultural commodities in interstate and foreign commerce and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Agricultural Adjustment Act of 1938."

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of Congress to continue the Soil Conservation and Domestic Allotment Act, as amended, for the purpose of conserving national resources, preventing the wasteful use of soil fertility, and of preserving, maintaining, and rebuilding the farm and ranch land resources in the national public interest; to accomplish these purposes through the encouragement of soil-building and soil-conserving crops and practices; to assist in the marketing of agricultural commodities for domestic consumption and for export; and to regulate interstate and foreign commerce in cotton, wheat, corn, tobacco, and rice to the extent necessary to provide an orderly, adequate, and balanced flow of such commodities in interstate and foreign commerce through storage of reserve supplies, loans, marketing quotas, assisting farmers to obtain, insofar as practicable, parity prices for such commodities and parity of income, and assisting consumers to obtain an adequate and steady supply of such commodities at fair prices.

TITLE I—AMENDMENTS TO SOIL CONSERVATION AND DOMESTIC ALLOTMENT ACT

SEC. 101.[1] * * *.

* * * *In carrying out the provisions of this section in the continental United States, the Secretary is directed to utilize the services of local and State committees selected as hereinafter provided. The Secretary shall designate local administrative areas as units for administration of programs under this section. No such local area shall include more than one county or parts of different counties. Farmers within any such local administrative area, and participating or cooperating in programs administered within such area, shall elect annually from among their number a local committee of not more than three members for such area and shall also elect annually from among their number a delegate to a county convention for the election of a county committee. The delegates from the various local areas in the county shall, in a county convention, elect, annually, the county committee for the county which shall consist of three members who are farmers in the county. The local committee shall select a secretary and may utilize the county agricultural extension agent for such purpose. The county committee shall select a secretary who may be the county agricultural extension agent. If such county agricultural extension agent shall not have been elected secretary of such committee, he shall be ex officio a member of the county committee. The county agricultural extension agent shall not have*

[1] This provision is an amendment to Section 8 (b) of the Soil Conservation and Domestic Allotment Act (49 Stat. 1148).

the power to vote. In any county in which there is only one local committee the local committee shall also be the county committee. In each State there shall be a State committee for the State composed of not less than three or more than five farmers who are legal residents of the State and who are appointed by the Secretary. The State director of the Agricultural Extension Service shall be ex officio a member of such State committee. The ex officio members of the county and State committees shall be in addition to the number of members of such committees hereinbefore specified. The Secretary shall make such regulations as are necessary relating to the selection and exercise of the functions of the respective committees, and to the administration, through such committees, of such programs.

* * * * *

TITLE III—LOANS, PARITY PAYMENTS, CONSUMER SAFEGUARDS, AND MARKETING QUOTAS

SUBTITLE A—DEFINITIONS, LOANS, PARITY PAYMENTS, AND CONSUMER SAFEGUARDS

DEFINITIONS

SEC. 301. (a) GENERAL DEFINITIONS.—For the purposes of this title and the declaration of policy—

(1) "Parity," as applied to prices for any agricultural commodity, shall be that price for the commodity which will give to the commodity a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of such commodity in the base period; and, in the case of all commodities for which the base period is the period August 1909 to July 1914, which will also reflect current interest payments per acre on farm indebt-

edness secured by real estate, tax payments per acre on farm real estate, and freight rates, as contrasted with such interest payments, tax payments, and freight rates during the base period. The base period in the case of all agricultural commodities except tobacco shall be the period August 1909 to July 1914, and, in the case of tobacco, shall be the period August 1919 to July 1929.

(2) "Parity," as applied to income, shall be that per capita net income of individuals on farms from farming operations that bears to the per capita net income of individuals not on farms the same relation as prevailed during the period from August 1909 to July 1914.

(3) The term "interstate and foreign commerce" means sale, marketing, trade, and traffic between any State or Territory or the District of Columbia or Puerto Rico, and any place outside thereof; or between points within the same State or Territory or within the District of Columbia or Puerto Rico, through any place outside thereof; or within any Territory or within the District of Columbia or Puerto Rico.

(4) The term "affect interstate and foreign commerce" means, among other things, in such commerce, or to burden or obstruct such commerce or the free and orderly flow thereof; or to create or tend to create a surplus of any agricultural commodity which burdens or obstructs such commerce or the free and orderly flow thereof.

(5) The term "United States" means the several States and Territories and the District of Columbia and Puerto Rico.

(6) The term "State" includes a Territory and the District of Columbia and Puerto Rico.

(7) The term "Secretary" means the Secretary of Agriculture, and the term "Department" means the Department of Agriculture.

(8) The term "person" means an individual, partnership, firm, joint-stock company, corporation, association, trust, estate, or any agency of a State.

* * * * *

(b) DEFINITIONS APPLICABLE TO ONE OR MORE COMMODITIES.—For the purposes of this title—

* * * * *

(3) * * *

(C) "Carry-over" of tobacco for any marketing year shall be the quantity of such tobacco on hand in the United States at the beginning of such marketing year, which was produced in the United States prior to the beginning of the calendar year then current, except that in the case of cigar-filler and cigar-binder tobacco the quantity of type 46 on hand and theretofore produced in the United States during such calendar year shall also be included.

* * * * *

(6) (A) "Market," in the case of cotton, wheat, and tobacco, means to dispose of by sale, barter, or exchange, but, in the case of wheat, does not include disposing of wheat as premium to the Federal Crop Insurance Corporation under Title V.

* * * * *

(D) "Marketed," "marketing," and "for market" shall have corresponding meanings to the term "market" in the connection in which they are used.

(7) "Marketing year" means, in the case of the following commodities, the period beginning on the

first and ending with the second date specified below:

Corn, October 1–September 30;
Cotton, August 1–July 31;
Rice, August 1–July 31;
Tobacco (flue-cured), July 1–June 30;
Tobacco (other than flue-cured), October 1–September 30.

Insert on p. 182 in lieu of the 12th line

(B) The "normal supply" of tobacco shall be a

plus 175 per centum of a normal year's domestic consumption and 65 per centum of a normal year's exports as an allowance for a normal carry-over.

(11) * * *

(B) "Normal year's domestic consumption," in the case of cotton and tobacco, shall be the yearly average quantity of the commodity produced in the United States that was consumed in the United States during the ten marketing years immediately preceding the marketing year in which such consumption is determined, adjusted for current trends in such consumption.

* * * * *

(12) "Normal year's exports" in the case of corn, cotton, rice, tobacco, and wheat shall be the yearly average quantity of the commodity produced in the United States that was exported from the United States during the ten marketing years (or, in the case of rice, the five marketing years) immediately preceding the marketing year in which such exports are determined, adjusted for current trends in such exports.

* * * * *

(14) * * *.

(B) "Reserve supply level" of tobacco shall be the normal supply plus 5 per centum thereof, to insure a supply adequate to meet domestic consumption and export needs in years of drought, flood, or other adverse conditions, as well as in years of plenty.

(15) "Tobacco" means each one of the kinds of tobacco listed below comprising the types specified as classified in Service and Regulatory Announcement Numbered 118 of the Bureau of Agricultural Economics of the Department:

Flue-cured tobacco, comprising types 11, 12, 13, and 14;

Fire-cured and dark air-cured tobacco, comprising types 21, 22, 23, 24, 35, 36, and 37;

Burley tobacco, comprising type 31;

Maryland tobacco, comprising type 32;

Cigar-filler and cigar-binder tobacco, comprising types 42, 43, 44, 45, 46, 51, 52, 53, 54, and 55;

Cigar-filler tobacco, comprising type 41.

The provisions of this title shall apply to each of such kinds of tobacco severally.

(16) * * *.

(B) "Total supply" of tobacco for any marketing year shall be the carry-over at the beginning of such marketing year plus the estimated production thereof in the United States during the calendar year in which such marketing year begins, except that the estimated production of type 46 tobacco during the marketing year with respect to which the determination is being made shall be used in lieu of the estimated production of such type dur-

ing the calendar year in which such marketing year begins in determining the total supply of cigar-filler and cigar-binder tobacco.

(c) The latest available statistics of the Federal Government shall be used by the Secretary in making the determinations required to be made by the Secretary under this Act.

* * * * * *

LOANS ON AGRICULTURAL COMMODITIES

SEC. 302. (a) The Commodity Credit Corporation is authorized, upon recommendation of the Secretary and with the approval of the President, to make available loans on agricultural commodities (including dairy products). Except as otherwise provided in this section, the amount, terms, and conditions of such loans shall be fixed by the Secretary, subject to the approval of the Corporation and the President.

SUBTITLE B—MARKETING QUOTAS

PART I.—MARKETING QUOTAS—TOBACCO

LEGISLATIVE FINDING

SEC. 311 (a). The marketing of tobacco constitutes one of the great basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare. Tobacco produced for market is sold on a Nation-wide market and, with its products, moves almost wholly in interstate and foreign commerce from the producer to the ultimate consumer. The farmers producing such com-

modity are subject in their operations to uncontrollable natural causes, are widely scattered throughout the Nation, in many cases such farmers carry on their farming operations on borrowed money or leased lands, and are not so situated as to be able to organize effectively, as can labor and industry through unions and corporations enjoying Government protection and sanction. For these reasons, among others, the farmers are unable without Federal assistance to control effectively the orderly marketing of such commodity with the result that abnormally excessive supplies thereof are produced and dumped indiscriminately on the Nation-wide market.

(b) The disorderly marketing of such abnormally excessive supplies affects, burdens, and obstructs interstate and foreign commerce by (1) materially affecting the volume of such commodity marketed therein, (2) disrupting the orderly marketing of such commodity therein, (3) reducing the price for such commodity with consequent injury and destruction of interstate and foreign commerce in such commodity, and (4) causing a disparity between the prices for such commodity in interstate and foreign commerce and industrial products therein, with a consequent diminution of the volume of interstate and foreign commerce in industrial products.

(c) Whenever an abnormally excessive supply of tobacco exists, the marketing of such commodity by the producers thereof directly and substantially affects interstate and foreign commerce in such commodity and its products, and the operation of the provisions of this Part becomes necessary and

appropriate in order to promote, foster, and maintain an orderly flow of such supply in interstate and foreign commerce.

NATIONAL MARKETING QUOTA

SEC. 312. (a) Whenever, on the 15th day of November of any calendar year, the Secretary finds that the total supply of tobacco as of the beginning of the marketing year then current exceeds the reserve supply level therefor, the Secretary shall proclaim the amount of such total supply, and, beginning on the first day of the marketing year next following and continuing throughout such year, a national marketing quota shall be in effect for the tobacco marketed during such marketing year. The Secretary shall also determine and specify in such proclamation the amount of the national marketing quota in terms of the total quantity of tobacco which may be marketed, which will make available during such marketing year a supply of tobacco equal to the reserve supply level. Such proclamation shall be made not later than the 1st day of December in such year.[2]

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[2] Sec. 19 of the act entitled "An act to amend the Agricultural Adjustment Act of 1938, and for other purposes," Public, No. 470, 75th Cong., approved April 7, 1938, provides as follows:

"The proclamations heretofore issued by the Secretary of Agriculture under sections 312 (a), 327, 328, and 345 of the Agricultural Adjustment Act of 1938 shall be effective as provided in said sections, and no provision of any amendment made by this Act shall be construed as requiring any further action under section 312 (c) or 347 of the Agricultural Adjustment Act of 1938 with respect to marketing years beginning in 1938."

(b) Whenever in the case of burley tobacco, and fire-cured and dark air-cured tobacco, respectively, the total supply proclaimed pursuant to the provisions of subsection (a) of this section exceeds the reserve supply level by more than 5 per centum and a national marketing quota is not in effect for such tobacco during the marketing year then current, a national marketing quota shall also be in effect for such tobacco marketed during the period from the date of such proclamation to the end of such current marketing year, and the Secretary shall determine and shall specify in such proclamation the amount of such national marketing quota in terms of the total quantity which may be marketed, which will make available during such current marketing year a supply of tobacco equal to the reserve supply level. The provisions of this subsection shall not be effective prior to the beginning of the marketing year beginning in the calendar year 1938.

(c) Within thirty days after the date of the issuance of the proclamation specified in subsection (a) of this section, the Secretary shall conduct a referendum of farmers who were engaged in production of the crop of tobacco harvested prior to the holding of the referendum to determine whether such farmers are in favor of or opposed to such quota. If in the case of burley tobacco, or fire-cured and dark air-cured tobacco, respectively, farmers would be subject to a national quota for the next succeeding marketing year pursuant to the provisions of subsection (a) of this section, and also to a national marketing quota for the current marketing year pursuant to the provisions of subsection (b) of this

section, the referendum shall provide for voting with respect to each such quota. If more than one-third of the farmers voting in the referendum oppose such quota, the Secretary shall, prior to the 1st day of January, proclaim the result of the referendum and such quota shall not be effective thereafter.[3]

(d) In connection with the determination and proclamation of any marketing quota for the 1938-1939 marketing year, the determination by the Secretary pursuant to subsection (a) of this section shall be made and proclaimed within fifteen days following the date of the enactment of this Act, and the proclamation of the Secretary pursuant to subsection (c) of this section shall be made within forty-five days following the date of the enactment of this Act.

(e) Marketing quotas shall not be in effect with respect to cigar-filler tobacco comprising type 41 during the marketing year beginning in 1938 or the marketing year beginning in 1939.

(f) Notwithstanding any other provisions of this Act, the Secretary shall, within fifteen days after the enactment of this subsection (f), proclaim the amount of the total supply of burley tobacco for the marketing year therefor beginning October 1, 1937, and a national marketing quota shall be in effect for burley tobacco marketed during the marketing year for such tobacco beginning October 1, 1938. The Secretary shall also determine and specify in such proclamation the amount of such national marketing quota in terms of the total quantity of such tobacco which may be mar-

[3] See footnote on preceding page.

eted, which will make available during the marketing year beginning October 1, 1938, a supply of such tobacco equal to the reserve supply level. The referendum with respect to such quota, pursuant to subsection (c) of this section, shall be held and the results thereof proclaimed within forty-five days after the enactment of this subsection (f).[4]

SEC. 313. (a) The national marketing quota for tobacco established pursuant to the provisions of section 312, less the amount to be allotted under subsection (c) of this section, shall be apportioned by the Secretary among the several States on the basis of the total production of tobacco in each State during the five calendar years immediately preceding the calendar year in which the quota is proclaimed (plus, in applicable years, the normal production on the acreage diverted under previous agricultural adjustment and conservation programs), with such adjustments as are determined to be necessary to make correction for abnormal conditions of production, for small farms, and for trends in production, giving due consideration to seed bed and other plant diseases during such five-year period: *Provided, however,* That to prevent in any case too sharp and sudden reduction in acreage of tobacco production in any State, the marketing quota for flue-cured tobacco for any State for any marketing year shall not be reduced to a point less than 75 per centum of the production of flue-cured tobacco in such State for the year 1937.

[4] This subsection (f) was added by the act entitled "An act amending section 312 of the Agricultural Adjustment Act of 1938," Public, No. 452, 75th Cong., approved March 26, 1938.

(b) The Secretary shall provide, through the local committees, for the allotment of the marketing quota for any State among the farms on which tobacco is produced, on the basis of the following: Past marketing of tobacco, making due allowance for drought, flood, hail, other abnormal weather conditions, plant bed, and other diseases; land, labor, and equipment available for the production of tobacco; crop-rotation practices; and the soil and other physical factors affecting the production of tobacco: *Provided*, That, except for farms on which for the first time in five years tobacco is produced to be marketed in the marketing year for which the quota is effective, the marketing quota for any farm shall not be less than the smaller of either (1) three thousand two hundred pounds, in the case of flue-cured tobacco, and two thousand four hundred pounds, in the case of other kinds of tobacco, or (2) the average tobacco production for the farm during the preceding three years, plus the average normal production of any tobacco acreage diverted under agricultural adjustment and conservation programs during such preceding three years.

(c) The Secretary shall provide, through local committees, for the allotment of not in excess of 5 per centum of the national marketing quota (1) to farms in any State whether it has a State quota or not on which for the first time in five years tobacco is produced to be marketed in the year for which the quota is effective and (2) for further increase of allotments to small farms pursuant to the proviso in subsection (b) of this section on the basis of the following: Land, labor, and equipment available for the production of tobacco; crop-rota-

tion practices; and the soil and other physical factors affecting the production of tobacco: *Provided,* That farm marketing quotas established pursuant to this subsection for farms on which tobacco is produced for the first time in five years shall not exceed 75 per centum of the farm marketing quotas established pursuant to subsection (b) of this section for farms which are similar with respect to the following: Land, labor, and equipment available for the production of tobacco, crop-rotation practices, and the soil and other physical factors affecting the production of tobacco.

(d) Farm marketing quotas may be transferred only in such manner and subject to such conditions as the Secretary may prescribe by regulations.

(e) *In case of flue-cured tobacco, the national quota for 1938 is increased by a number of pounds required to provide for each State in addition to the State poundage allotment a poundage not in excess of* **4 per centum** [5] *of the allotment which shall be apportioned in amounts which the Secretary determines to be fair and reasonable to farms in the State receiving allotments under the Agricultural Adjustment Act of 1938 which the Secretary determines are inadequate in view of past production of tobacco, and for each year by a number of pounds sufficient to assure that any State receiving a State poundage allotment of flue-cured tobacco shall receive a minimum State poundage*

[5] The bold-faced words were substituted by sec. 2 (a) of the act entitled "An act to amend the Agricultural Adjustment Act of 1938," Public, No. 557, 75th Cong., approved May 31, 1938, in lieu of the expression "2 per centum."

allotment of flue-cured tobacco equal to the average national yield for the preceding five years of five hundred acres of such tobacco.[6]

(f) In the case of fire-cured and dark air-cured and burley tobacco, the national quota for 1938 is increased by a number of pounds required to provide for each State in addition to the State poundage allotment a poundage not in excess of 2 per centum of the allotment which shall be apportioned in amounts which the Secretary determines to be fair and reasonable to farms in the State receiving allotments under this section which the Secretary determines are inadequate in view of past production of tobacco.[7]

PENALTIES

SEC. 314. The marketing of any tobacco in excess of the marketing quota for the farm on which the tobacco is produced, except the marketing of any such tobacco for nicotine or other byproduct uses, shall be subject to a penalty of 50 per centum of the market price of such tobacco on the date of such marketing, or if the following rates are higher, 3 cents per pound in the case of flue-cured, Maryland, or burley, and 2 cents per pound in the case of all other kinds of tobacco. Such penalty shall be paid by the person who acquires

[6] This italicized subsection was added by sec. 5 of the act entitled "An act to amend the Agricultural Adjustment Act of 1938, and for other purposes," Public, No. 470, 75th Cong., approved April 7, 1938.

[7] This subsection (f) was added by sec. 2 (b) of the act entitled "An act to amend the Agricultural Adjustment Act of 1938," Public, No. 557, 75th Cong., approved May 31, 1938.

such tobacco from the producer but an amount equivalent to the penalty may be deducted by the buyer from the price paid to the producer in case such tobacco is marketed by sale; or, if the tobacco is marketed by the producer through a warehouseman or other agent, such penalty shall be paid by such warehouseman or agent, who may deduct an amount equivalent to the penalty from the price paid to the producer: *Provided,* That in case any tobacco is marketed directly to any person outside the United States the penalty shall be paid and remitted by the producer.

* * * * * * *

SUBTITLE C—ADMINISTRATIVE PROVISIONS

PART I—PUBLICATION AND REVIEW OF QUOTAS

APPLICATION OF PART

SEC. 361. This Part shall apply to the publication and review of farm marketing quotas established for tobacco, corn, wheat, cotton, and rice established under subtitle B.

PUBLICATION AND NOTICE OF QUOTA

SEC. 362. All acreage allotments, and the farm marketing quotas established for farms in a county or other local administrative area shall, in accordance with regulations of the Secretary, be made and kept freely available for public inspection in such county or other local administrative area. An additional copy of this information shall be kept available in the office of the county agricultural extension agent or with

the chairman of the local committee. Notice of the farm marketing quota of his farm shall be mailed to the farmer.

REVIEW BY REVIEW COMMITTEE

SEC. 363. Any farmer who is dissatisfied with his farm marketing quota may, within fifteen days after mailing to him of notice as provided in section 362, have such quota reviewed by a local review committee composed of three farmers appointed by the Secretary. Such committee shall not include any member of the local committee which determined the farm acreage allotment, the normal yield, or the farm marketing quota for such farm. Unless application for review is made within such period, the original determination of the farm marketing quota shall be final.

REVIEW COMMITTEE

SEC. 364. The members of the review committee shall receive as compensation for their services the same per diem as that received by the members of the committee utilized for the purposes of the Soil Conservation and Domestic Allotment Act, as amended. The members of the review committee shall not be entitled to receive compensation for more than thirty days in any one year.

INSTITUTION OF PROCEEDINGS

SEC. 365. If the farmer is dissatisfied with the determination of the review committee, he may, within fifteen days after a notice of such determination is mailed to him by registered mail, file a bill

in equity against the review committee as defendant in the United States district court, or institute proceedings for review in any court of record of the State having general jurisdiction, sitting in the county or the district in which his farm is located, for the purpose of obtaining a review of such determination. Bond shall be given in an amount and with surety satisfactory to the court to secure the United States for the costs of the proceeding. The bill of complaint in such proceeding may be served by delivering a copy thereof to any one of the members of the review committee. Thereupon the review committee shall certify and file in the court a transcript of the record upon which the determination complained of was made, together with its findings of fact.

COURT REVIEW

SEC. 366. The review by the court shall be limited to questions of law, and the findings of fact by the review committee, if supported by evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the review committee, the court may direct such additional evidence to be taken before the review committee in such manner and upon such terms and conditions as to the court may seem proper. The review committee may modify its findings of fact or its determination by reason of the additional evidence so taken, and it shall file with the court such modified findings or determination, which findings of fact shall be con-

clusive. At the earliest convenient time, the court, in term time or vacation, shall hear and determine the case upon the original record of the hearing before the review committee, and upon such record as supplemented if supplemented, by further hearing before the review committee pursuant to direction of the court. The court shall affirm the review committee's determination, or modified determination, if the court determines that the same is in accordance with law. If the court determines that such determination or modified determination is not in accordance with law, the court shall remand the proceeding to the review committee with direction either to make such determination as the court shall determine to be in accordance with law or to take such further proceedings as, in the court's opinion, the law requires.

STAY OF PROCEEDINGS AND EXCLUSIVE JURISDICTON

SEC. 367. The commencement of judicial proceedings under this Part shall not, unless specifically ordered by the court, operate as a stay of the review committee's determination. Notwithstanding any other provision of law, the jurisdiction conferred by this Part to review the legal validity of a determination made by a review committee pursuant to this Part shall be exclusive. No court of the United States or of any State shall have jurisdiction to pass upon the legal validity of any such determination except in a proceeding under this Part.

NO EFFECT ON OTHER QUOTAS

SEC. 368. Notwithstanding any increase of any farm marketing quota for any farm as a result of

review of the determination thereof under this Part, the marketing quotas for other farms shall not be affected.

PART II—ADJUSTMENT OF QUOTAS AND ENFORCEMENT

GENERAL ADJUSTMENTS OF QUOTAS

SEC. 371. (a) If at any time the Secretary has reason to believe that in the case of corn, wheat, cotton, rice, or tobacco the operation of farm marketing quotas in effect will cause the amount of such commodity which is free of marketing restrictions to be less than the normal supply for the marketing year for the commodity then current, he shall cause an immediate investigation to be made with respect thereto. In the course of such investigation due notice and opportunity for hearing shall be given to interested persons. If upon the basis of such investigation the Secretary finds the existence of such fact, he shall proclaim the same forthwith. He shall also in such proclamation specify such increase in, or termination of, existing quotas as he finds, on the basis of such investigation, is necessary to make the amount of such commodity which is free of marketing restrictions equal the normal supply.

(b) If the Secretary has reason to believe that, because of a national emergency or because of a material increase in export demand, any national marketing quota for corn, wheat, cotton, rice, or tobacco should be increased or terminated, he shall cause an immediate investigation to be made to determine whether the increase or termination is necessary in order to effectuate the declared policy of this Act or to meet such emergency or increase in

export demand. If, on the basis of such investigation, the Secretary finds that such increase or termination is necessary, he shall immediately proclaim such finding (and if he finds an increase is necessary, the amount of the increase found by him to be necessary) and thereupon such quota shall be increased, or shall terminate, as the case may be.

(c) In case any national marketing quota for any commodity is increased under this section, each farm marketing quota for the commodity shall be increased in the same ratio.

(d) In the case of corn, whenever such proclamation specifies an increase in marketing quotas, the storage amounts applicable to corn shall be adjusted downward to the amount which would have been required to be stored if such increased marketing quotas had been in effect. Whenever in the case of corn, such proclamation provides for termination of marketing quotas, storage under seal shall no longer be required.

PAYMENT AND COLLECTION OF PENALTIES

SEC. 372. (a) The penalty with respect to the marketing, by sale, of wheat, cotton, or rice, if the sale is to any person within the United States, shall be collected by the buyer.

(b) All penalties provided for in Subtitle B shall be collected and paid in such manner, at such times, and under such conditions as the Secretary may by regulations prescribe. Such penalties shall be remitted to the Secretary by the person liable for the penalty, except that if any other person is liable for the collection of the penalty, such other person shall remit the penalty. The amount of such pen-

alties shall be covered into the general fund of the Treasury of the United States.

(c) Whenever, pursuant to a claim filed with the Secretary within one year after payment to him of any penalty collected from any person pursuant to this Act, the Secretary finds that such penalty was erroneously, illegally, or wrongfully collected, the Secretary shall certify to the Secretary of the Treasury for payment to the claimant, in accordance with regulations prescribed by the Secretary of the Treasury, such amount as the Secretary finds the claimant is entitled to receive as a refund of such penalty.[8]

The Secretary is authorized to prescribe regulations governing the filing of such claims and the determination of such refunds.

(d) No penalty shall be collected under this Act with respect to the marketing of any agricultural commodity grown for experimental purposes only by any publicly owned agricultural experiment station.[8]

REPORTS AND RECORDS

SEC. 373. (a) This subsection shall apply to warehousemen, processors, and common carriers of corn, wheat, cotton, rice, or tobacco, and all ginners of cotton, all persons engaged in the business of purchasing corn, wheat, cotton, rice, or tobacco from producers, and all persons engaged in the business of redrying, prizing, or stemming tobacco

[8] The italicized subsection was added by sec. 11 of the act entitled "An act to amend the Agricultural Adjustment Act of 1938, and for other purposes," Public, No. 470, 75th Cong., approved April 7, 1938.

for producers. Any such person shall, from time to time on request of the Secretary, report to the Secretary such information and keep such records as the Secretary finds to be necessary to enable him to carry out the provisions of this title. Such information shall be reported and such records shall be kept in accordance with forms which the Secretary shall prescribe. For the purpose of ascertaining the correctness of any report made or record kept, or of obtaining information required to be furnished in any report, but not so furnished, the Secretary is hereby authorized to examine such books, papers, records, accounts, correspondence, contracts, documents, and memoranda as he has reason to believe are relevant and are within the control of such person. Any such person failing to make any report or keep any record as required by this subsection or making any false report or record shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500.

(b) Farmers engaged in the production of corn, wheat, cotton, rice, or tobacco for market shall furnish such proof of their acreage, yield, storage, and marketing of the commodity in the form of records, marketing cards, reports, storage under seal, or otherwise as the Secretary may prescribe as necessary for the administration of this title.

(c) All data reported to or acquired by the Secretary pursuant to this section shall be kept confidential by all officers and employees of the Department, and only such data so reported or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing under this title.

MEASUREMENT OF FARMS AND REPORT OF PLANTINGS

SEC. 374. The Secretary shall provide, through the county and local committees, for measuring farms on which corn, wheat, cotton, or rice is produced and for ascertaining whether the acreage planted for any year to any such commodity is in excess of the farm acreage allotment for such commodity for the farm under this title. If in the case of any farm the acreage planted to any such commodity on the farm is in excess of the farm acreage allotment for such commodity for the farm, the committee shall file with the State committee a written report stating the total acreage on the farm in cultivation and the acreage planted to such commodity.

REGULATION

SEC. 375. (a) The Secretary shall provide by regulations for the identification, wherever necessary, of corn, wheat, cotton, rice, or tobacco so as to afford aid in discovering and identifying such amounts of the commodities as are subject to and such amounts thereof as are not subject to marketing restrictions in effect under this title.

(b) The Secretary shall prescribe such regulations as are necessary for the enforcement of this title.

COURT JURISDICTION

SEC. 376. The several district courts of the United States are hereby vested with jurisdiction specifically to enforce the provisions of this title. If and when the Secretary shall so request, it shall be the duty of the several district attorneys in their respective districts, under the direction of the At-

torney General, to institute proceedings to collect the penalties provided in this title. The remedies and penalties provided for herein shall be in addition to, and not exclusive of, any of the remedies or penalties under existing law.

SUBTITLE D—MISCELLANEOUS PROVISIONS AND APPROPRIATIONS

PART I—MISCELLANEOUS

* * * * *

UTILIZATION OF LOCAL AGENCIES

SEC. 388. (a) The provisions of section 8 (b) and section 11 of the Soil Conservation and Domestic Allotment Act, as amended, relating to the utilization of State, county, local committees, the extension service, and other approved agencies, and to recognition and encouragement of cooperative associations, shall apply in the administration of this Act; and the Secretary shall, for such purposes, utilize the same local, county, and State committees as are utilized under sections 7 to 17, inclusive, of the Soil Conservation and Domestic Allotment Act, as amended. The local administrative areas designated under section 8 (b) of the Soil Conservation and Domestic Allotment Act, as amended, for the administration of programs under that Act, and the local administrative areas designated for the administration of this Act shall be the same.

(b) The Secretary is authorized and directed, from any funds made available for the purposes of the Acts in connection with which county committees are utilized, to make payments to county commit-

tees of farmers to cover the estimated administrative expenses incurred or to be incurred by them in cooperating in carrying out the provisions of such Acts. All or part of such estimated administrative expenses of any such committee may be deducted pro rata from the Soil Conservation Act payments, parity payments, or loans, or other payments under such Acts, made unless payment of such expenses is otherwise provided by law. The Secretary may make such payments to such committees in advance of determination of performance by farmers.

PERSONNEL

SEC. 389. The Secretary is authorized and directed to provide for the execution by the Agricultural Adjustment Administration of such of the powers conferred upon him by this Act as he deems may be appropriately exercised by such Administration; and for such purposes the provisions of law applicable to appointment and compensation of persons employed by the Agricultural Adjustment Administration shall apply.

SEPARABILITY

SEC. 390. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons or circumstances, and the provisions of the Soil Conservation and Domestic Allotment Act, as amended, shall not be affected thereby. Without limiting the generality of the foregoing, if any provision of this Act should be held not to be within

the power of the Congress to regulate interstate and foreign commerce, such provision shall not be held invalid if it is within the power of the Congress to provide for the general welfare or any other power of the Congress. If any provision of this Act for marketing quotas with respect to any commodity should be held invalid, no provision of this Act for marketing quotas with respect to any other commodity shall be affected thereby. If the application of any provision for a referendum should be held invalid, the application of other provisions shall not be affected thereby. If by reason of any provision for a referendum the application of any such other provision to any person or circumstance is held invalid, the application of such other provision to other persons or circumstances shall not be affected thereby.

* * * * *

B. H. R. REPT. 1645, 75TH CONG., 2D SESS.

AGRICULTURAL ADJUSTMENT ACT OF 1937

NOVEMBER 27, 1937.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. JONES, from the Committee on Agriculture, submitted the following

REPORT

[To accompany H. R. 8505]

The Committee on Agriculture, to whom was referred the bill (H. R. 8505) to provide for the conservation of national soil resources and to provide an adequate and balanced flow of agricultural commodities in interstate and foreign commerce, having had the same under consideration, report it back to the House without amendment and recommend that the bill do pass.

GENERAL STATEMENT

During the last 15 years, the problems which have beset agriculture have commanded the attention of ever administration up to the present time. During these years, bills proposing solutions of these problems have been introduced in every Con-

gress. Every such proposal has received the careful consideration of the committees of Congress charged with the formulation of agricultural legislation. In 1933, on the recommendation by such committees, the Agricultural Adjustment Act was enacted. That act was in operation just short of 3 years before its acreage-adjustment provisions were declared invalid by the Supreme Court. Thereafter the Soil Conservation and Domestic Allotment Act was enacted. That act had as its primary purpose the conservation and rebuilding of the soil resources of the Nation. It is accomplishing this purpose. The incidental effect which it has had on the acreage devoted to major soil-depleting crops has not, however, been sufficient to prevent the production of large surpluses, which, unregulated, have congested the channels of interstate and foreign commerce. Hence legislation in addition to the Soil Conservation and Domestic Allotment Act is necessary at this time.

Legislation to meet the present farm problem should not be focused on the control of acreage, except to the extent of the incidental control brought about by inducing farmers to carry out recognized soil-conservation and soil-building practices on their farms. Such legislation should not be posited on an economy of scarcity. Nor should such legislation be designed to meet a temporary emergency. It should, on the contrary, encourage the abundant production of agricultural commodities, and provide for the storage of warehousing of the production above current needs in order to have such commodities available at reasonable prices in years of drought or other adverse conditions. Such legislation should, by means of loans, assist

farmers to cooperate with Government in reaching this desirable objective. Such legislation should provide means of regaining our export markets in farm products to the end that such products may flow freely into the markets of the world. As an aid to accomplishing this purpose, and as a benefit to both farmers and consumers of farm products in the United States, it should provide means for examining the freight rate structure so far as it relates to freight rates on farm products. And finally it should encourage research into the possibilities of new uses and new markets for agricultural commodities in cooperation with the State agricultural colleges and other State agencies.

During the first session of the Seventy-fifth Congress, extended and careful consideration was given by the committee to various proposals which had been referred to it. It sought information with respect to these proposals, and their probable effects, in conference both with the leaders of the various farm organizations and with the representatives of the Department of Agriculture. During the adjournment of Congress virtually every member of the committee discussed the various proposals with the farmers in his district. Many of the members of the committee attended one or more of the hearings conducted by the Senate Committee on Agriculture and Forestry during the past summer and fall. The committee has also had the benefit of the many hearings, reports, and studies dealing with the farm problem which have been published during the last 15 years.

The bill (H. R. 8505) herewith reported approaches the farm problem on four major fronts. First. It strengthens the Soil Conservation and

Domestic Allotment Act and more clearly defines the powers of the Secretary of Agriculture under that act. Second. It provides for loans on agricultural commodities in order to enable farmers to finance the storage and warehousing of commodities in years of excessive yields so that surpluses may be kept off the market, and so that in years of drought or other adverse conditions, supplies of agricultural commodities will be plentiful. Third. In years of excessive production it provides for the withholding from market in interstate and foreign commerce of surpluses of the five major nonperishable agricultural commodities for the purpose of removing the depressing effect which such surpluses exert on such commerce. Fourth. It provides means by which markets at home and abroad for agricultural products may be restored and new ones may be found. This can well be regarded as the most important single feature of the bill. While provision is made for handling excessive surpluses temporarily through moderate control features, the more important and fruitful approach to the solution of the farm problem is in expansion of domestic and foreign markets.

The bill makes it the duty of the Secretary of Agriculture to use the $100,000,000 available annually under section 32 of the 1935 amendments in disposing of farm products at home, and in expanding foreign markets for surplus farm commodities and their products abroad. By paying small losses the committee feels that wider uses for such products can be found both here and in foreign countries. The bill contemplates means by which agricultural products may get to the

markets more cheaply. The Secretary of Agriculture is given power to complain before the Interstate Commerce Commission with respect to rates, tariffs, and charges on agricultural products, and the Secretary is to aid cooperative associations in their complaints on such matters. Finally, the bill provides for research into the possibilities of new uses and markets for farm products.

The declaration of policy of the bill sets forth its objectives, which are to accomplish the above purposes.

CONSTITUTIONAL BASIS

The various provisions of the bill are within the Federal power under the Constitution.

* * * * * * *

MARKETING QUOTA PROVISIONS

The marketing quota provisions represent exercises of the power of Congress over interstate and foreign commerce. Citation of cases is unnecessary to show that Congress has the power to regulate marketing which occurs directly in interstate and foreign commerce. It is familiar doctrine, too, that the commerce power of Congress is not limited to the regulation of the actual movement of goods in interstate and foreign commerce. The power extends to encompass any object which burdens or affects interstate commerce, even if by so doing intrastate commerce is regulated. Federal power to remove restraints on interstate and foreign commerce is not limited to restraints which occur in that commerce. Thus future trading on commodities exchanges (*Chicago Board of Trade* v.

Olsen (1923) 262 U. S. 1); meat packing (*Stafford* v. *Wallace* (1922), 258 U. S. 495); buying and selling of livestock on a commission basis (*Tagg Brothers and Moorhead* v. *United States* (1930), 280 U. S. 420); intrastate transportation by railroad (*Shreveport case* (1913), 234 U. S. 342); conspiracies to restrain interstate commerce (*Bedford Cut Stone Company* v. *Stonecutters' Association* (1927), 274 U. S. 37); *Local 167* v. *United States* (1934), 291 U. S. 293); and unfair labor practices (*Labor Board* v. *Jones and Laughlin Steel Corporation* (1937), 301 U. S. 1); (*Virginian Railway* v. *Federation* (1937), 300 U. S. 515) do not constitute interstate commerce. Yet in each one of the above cases the exercise of Federal power has been upheld. The principle underlying such decisions is that the transactions to which the statutes there construed related did have a "direct and immediate" effect on interstate commerce.

The question of whether the connection between the subject regulated and interstate commerce is sufficiently close and direct to justify the regulation is one for Congress to determine. If there is a reasonable basis for a conclusion reached by Congress that the subject of regulation does affect interstate commerce, then the subject is one within Federal control and the exercise of the power is valid. The question then becomes one of determining whether the facts are such that Congress may reasonably conclude that the matters regulated do have an effect on interstate and foreign commerce.

As said by Chief Justice Taft in *Stafford* v. *Wallace* (1922) (258 U. S. 495, at p. 520):

> Whatever amounts to more or less constant practice and threatens to obstruct or

> unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This Court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.

See also Chief Justice Hughes in *Labor Board* v. *Jones and Laughlin Steel Corporation* (301 U. S. 1, at p. 37).

The studies during the past 15 years conducted by the committees of Congress amply demonstrate that there is more than a reasonable basis for concluding that the marketing of excessive supplies of the major agricultural commodities, tobacco, field corn, wheat, cotton, and rice, do have a direct and immediate effect on interstate and foreign commerce in these commodities as well as on interstate and foreign commerce generally. They demonstrate, too, that deficiencies in marketing farm commodities in interstate and foreign commerce result in diminutions of and burdens upon that commerce. These studies further demonstrate that if a regular even flow of such commodities into interstate and foreign commerce could be secured, then the disastrous consequences following such irregularity in marketing could be avoided.

Following the discussion of the marketing quota provisions relating to each of these commodities there are set forth analyses of statistics of the Department of Agriculture relating to each of these major commodities. From these figures it can be

said that, to a greater or less degree, as applied to each of these commodities:

(1) The commodity is of such substantial volume, is so valuable, and the need for it is so essential for national well-being that if interstate and foreign commerce in the commodity can be regulated in the national public interest, it should be.

(2) Most of the commodity moves almost directly from the place where produced into markets outside the State or, in some cases, into foreign markets. In cases where it does not move immediately into interstate or foreign markets in the form in which produced, it does so move in another, slightly changed, form or it is sure to do so. In both these cases the commodity is produced for an outside market in some form.

(3) In every case marketing for ultimate consumption (in any form) in the State where produced is a negligible part of the whole production.

(4) In all cases the factors determining whether or not the commodity will be marketed, when it will be, and the price at which it will be, are factors referable solely to the national or international market for which it is sold—not the local market.

(5) Excessive supplies (regardless of their cause) overtax the facilities for moving the commodity, bring to the markets amounts which they cannot absorb, and cause financial distress to producers and others engaged in the industry.

(6) Diminution in interstate and foreign commerce in other articles from regions of production to farming regions follows disruption of interstate and foreign commerce in such commodities.

(7) Deficient supplies leave idle transportation and marketing facilities and cause unwarranted high prices to consumers.

(8) If the excessive surpluses can be kept off the interstate and foreign market in years of plenty and fed into it in years of low production, stable orderly flow of interstate and foreign commerce will be assured.

* * * * *

TITLE III. MARKETING QUOTAS

This title contains the provisions relating to marketing quotas which apply to tobacco, corn, wheat, cotton, and rice. The title also includes the provisions relating to the review of marketing quotas established under it. In general, it can be said that the title provides in the case of each of those commodities a method by which excessive supplies of the commodity may be prevented from entering into interstate and foreign commerce in years in which the effect of marketing such supplies would be to upset the orderly marketing of such commodity.

Under the bill the marketing quota provisions relating to each of the commodities is set forth in a separate part. The various parts contains some provisions which are similar and are treated together here. Each part has its legislative findings which describe the effect on interstate and foreign commerce of the marketing of excessive and deficient supplies. In the case of each commodity a definition of "total supply," "carry-over," "normal supply," and, except in the case of cotton, "reserve supply level" is set forth. Total supply is carry-over from the previous year plus estimated

production. Normal supply is the 10-year average of domestic consumption plus exports, to which is added a percentage of that amount to assure a normal carry-over. Reserve supply level is an amount in excess of average domestic consumption and exports plus a carry-over adequate to insure domestic consumption and export needs at all times.

If the carry-over plus estimated production (total supply) exceeds the normal supply in the case of cotton, wheat, rice, and field corn, or exceeds the reserve supply level in the case of tobacco, by more than a stated percentage, marketing quotas go into effect. In the case of each commodity, after the determination of and announcement by the Secretary of facts on the basis of which marketing quotas are effective, he is to conduct a referendum of all farmers who would be subject to the quota on the commodity. If more than one-third of the farmers voting in the referendum oppose the quota, the quota becomes ineffective.

Each part has a provision for terminating or increasing quotas when the supply gets below an amount determined with reference to the amount which will be available for marketing. Each part (except field corn) requires the termination of marketing quotas if a national emergency or a material increase in export demand warrants such termination. Each part (except field corn) authorizes the Secretary to obtain information from persons acquiring the commodity from the farmer to enable the Secretary to carry out the part to which the commodity relates, and such information must be kept confidential. It can be disclosed only in a suit or administrative hearing involving the administration of the provisions.

There is inserted here a table which, in brief compass, sets forth the various important dates on which action is taken under the various marketing-quota provisions. An examination of this table will give more clearly than the technical explanation of the provisions of the bill an idea of exactly when the findings are made and announced and when the quotas are effective. Under the table the assumption is made that marketing quotas are to be in effect on the crop harvested in 1940; 1940 has been selected to avoid special rules fixed for 1938 and 1939 in certain cases.

* * * * *

A discussion of each of the several parts of the title (to the extent that they vary from each other) is set forth under a heading relating to the commodity.

PART I.—MARKETING QUOTAS—TOBACCO

The marketing quota provisions relating to tobacco divide the various kinds of tobacco according to their recognized classification by the Department of Agriculture. This part is applicable to each of these kinds of tobacco severally. That is, each kind of tobacco is treated as if it were a separate commodity. As used in the part, the word "tobacco" means "kind of tobacco," and the word "tobacco" is used in the same sense in this report. The kinds so included are flue-cured tobacco, fire-cured tobacco, dark air-cured tobacco, burley tobacco, Maryland tobacco, and cigar-filler and cigar-binder tobacco. A specification of the types of tobacco included in each of these kinds is set forth in section 303 (a).

Whenever on November 15 the Secretary finds that on July 1 (in the case of flue-cured) or October 1 (in the case of other kinds) the carry-over plus estimated production of tobacco exceeded the reserve supply level, he is to so announce and the marketing quotas are to be in effect for tobacco marketed during the marketing year next following. That is, for tobacco harvested in the next year. The reserve supply level of any kind of tobacco is 5 percent in excess of the normal supply. The normal supply is a normal year's domestic consumption and exports plus 175 percent of a normal year's domestic consumption and 65 percent of a normal year's exports.

In the announcement that a marketing quota shall be in effect the Secretary is to specify in pounds of tobacco the quantity which may be marketed during the marketing year next following. That amount is an amount which would make available for marketing during that year a supply of tobacco equal to the reserve supply level. This is the national marketing quota. It is an amount in pounds of tobacco. The Secretary's announcement must be made not later than December 1.

Within 30 days after the issuance of his announcement the Secretary is required to conduct the referendum.

A special rule is provided for the determination and announcement of any marketing quota for the 1938–39 marketing year. The determination of supplies is to be made as of January 15, 1938, and announced not later than February 1, and the announcement of the result of the referendum is to be made prior to March 1, 1938.

When the Secretary has determined the amount of the national marketing quota he is to apportion that amount as provided in section 305. This apportionment is for the purpose of dividing up the total amount which may be marketed from the production of the year among the States and among the farms in each State.

The amount of the national marketing quotas (less amounts for new farms, etc., under section 305 (c)) is to be apportioned by the Secretary among the several States on the basis of the total production of tobacco in each State during the 5 calendar years immediately preceding the year in which the quota is announced (sec. 305 (a)). In making such apportionment, he is to make adjustments determined to be necessary to make correction for abnormal conditions in production, for small farms, and for trends in production during the 5-year period, and on account of diversion from tobacco production under agricultural adjustment and soil-conservation programs. The amount so apportioned to each State is to be apportioned, through local committees of farmers, among farmers producing tobacco on the basis of their past production of tobacco; land, labor, and equipment available for tobacco production; crop-rotation practices; and soil and other physical facilities for the production of tobacco. A minimum marketing quota to farms is provided. (This minimum here discussed does not apply to farms producing tobacco for the first time within 5 years.)

The minimum allotment to a farm is a stated amount, or the farmer's highest base acreage, whichever is lower. The flat minimum is 3,200 pounds in the case of flue-cured and 2,400 pounds

in the case of other kinds. The minimum amount based on highest base acreage is the average tobacco production of the farm during the preceding 3 years adjusted upward to equal the normal production of its highest tobacco acreage under the previous 3 years of adjustment and conservation programs.

Not to exceed 5 percent of the national marketing quota is to be allotted, through local committees, to farms on which tobacco is produced (to be marketed in the quota year) for the first time in 5 years, and to small farms to increase the allotments to them. This allotment is to be made on the basis of land, labor, and equipment available for tobacco production, crop-rotation practices, and the soil and other physical facilities affecting the production of tobacco. The allotment to the farms on which tobacco is produced for the first time in 5 years is not to exceed 75 percent of the allotment which would otherwise be made to the farm.

Farm-marketing quotas may be transferred but only in such manner and subject to such conditions as may be provided by the Secretary.

Any person who knowingly acquires tobacco from a producer if the tobacco is marketed by him from a farm in excess of the farm marketing quota, is subject to a penalty. The penalty is 50 percent of the market price, or 3 cents per pound in the case of flue-cured, Maryland, or burley, or 2 cents per pound in the case of all other kinds, whichever is higher. The purchaser, if he acquires the tobacco by purchase, may deduct the penalty from the purchase price. Penalties are to be remitted to the Secretary and are to accrue

to the United States. Failure on the part of persons acquiring tobacco from farmers, or engaged in performing certain acts with respect thereto for farmers, to furnish information or keep records subjects the offender to a fine of not more than $500.

The Secretary is given express authority to issue regulations with respect to the time and manner of the payment of penalties, the identification of marketings, and such other regulations as he deems necessary for the enforcement of the part.

EFFECT OF MARKETING ON INTERSTATE AND FOREIGN COMMERCE

The conclusion of the committee that the marketing of tobacco exerts a substantial and direct effect upon interstate and foreign commerce is more than justified by the following summary of the facts and figures relating thereto derived from available statistics of the Department of Agriculture.

ECONOMIC DATA RELATING TO TOBACCO

There are some 750,000 farm families engaged in the primary industry of producing and marketing tobacco. Receipts by these families for tobacco marketed during the period 1919–28 averaged about $280,000,000 per year. Although each family places on the market all or substantially all of the tobacco which it produces, sales are made with scant knowledge of or regard for the action taken by other persons engaged in similar work.

Tobacco is sold mainly through warehousemen or commission merchants, except in the case of Mary-

land, cigar-leaf and the dark-air and fire-cured types of tobacco where sales are made at the farm or through producers' cooperative-marketing associations. The operations of this group deal directly with the sale of the tobacco by producers to representatives of manufacturers and leaf-tobacco dealers, generally at established places of business. Around 1,300,000,000 pounds of tobacco have been marketed annually in the United States and in Puerto Rico during the last 10 years.

Control and direction of the great part of the manufacture of tobacco products is in the hands of a limited number of corporations. The prices offered to farmers by these corporations determine the price level on the market, and the prices at which the manufactured products are sold are largely controlled by them.

The Federal Trade Commission in its agricultural income inquiry states that in 1934, 13 principal tobacco manufacturers purchased the equivalent of 64 percent of the crop, and the three largest of such manufacturers a quantity equal to 46.2 percent of the crop. These same 13 corporations sold over 97 percent of the cigarettes, over 90 percent of the smoking tobacco, over 75 percent of the chewing tobacco, and over 98 percent of the snuff produced in the United States in 1934. The three companies reporting, respectively, the largest sales of cigarettes, of smoking tobacco, of chewing tobacco, and of snuff accounted for 80.1 percent, 64.8 percent, 68.7 percent, and 95.3 percent, respectively, of the 1934 production of these products.

TOBACCO IS SOLD ON A NATION-WIDE MARKET AND MOVES ALMOST WHOLLY IN INTERSTATE AND FOREIGN COMMERCE

When tobacco is placed on the market by producers, it is purchased by buyers representing manufacturers and dealers located throughout the world. Immediately after purchase, tobacco is either moved by the purchasers to redrying plants or, in the case of types which do not require redrying, shipped to plants of dealers or manufacturers. The types which do not require redrying constitute about one-fourth of the total poundage of tobacco. Redrying requires only a few hours, the tobacco being moved through the plants as speedily as possible.

From two-thirds to three-fourths of all of the tobacco processed in the United States is purchased on the markets in States other than those where the processing occurs. The principal tobacco products, for example cigarettes, are made up of different kinds of tobacco blended in a manner designed to secure certain taste effects and burning qualities. These different kinds of tobacco, produced in different parts of the country are complementary to each other for some purposes and must move in interstate commerce before they can be blended. Tables I and II appended hereto show the extent to which burley and flue-cured tobacco must pass in interstate commerce before being processed. Table III, which shows the number of establishments, by States, engaged in the processing of tobacco, is further corroborative evidence.

The average production of burley tobacco is indicated in table I, in the 3 years 1931–33 amounted

to 376,352,000 pounds. In the States in which such tobacco was produced, the quantity processed was less than 18 percent of the total production therein.

The similar conditions are true with respect to flue-cured tobacco as indicated in table II. Production in the 3 years 1931–33 averaged 595,000,000 pounds. In the States in which such tobacco was produced, the quantity processed could not have exceeded about one-third of this amount. Actually the amount was much smaller as this figure of one-third is calculated without taking into account significant shipments of unprocessed tobacco among such States.

A preponderant amount of the kinds of tobacco other than flue-cured and burley tobacco also moves in interstate and foreign commerce. Commerce in fire-cured and dark air-cured tobacco is similar to commerce in flue-cured and burley tobacco. In 1935, 362 pounds of tobacco were processed in Maryland, while 27,935,000 pounds were produced in the State. A comparison for cigar-leaf tobacco similar to that shown for flue-cured and burley tobacco indicates that less than one-third of the total production of cigar-leaf tobacco is processed in the States in which the tobacco is produced.

Not only does the greater proportion of all types of tobacco move from the markets into interstate commerce, but large quantities of tobacco are purchased on the markets by foreign manufacturers on their own account and through orders placed with dealers. The total exports during the last decade amounted to a little over 70 percent of the domestic consumption of all tobacco.

FARMERS UNABLE TO ORGANIZE EFFECTIVELY FOR MARKETING OF TOBACCO

History reflects clearly the inability of tobacco farmers to organize effectively for the purpose of marketing their product. Numerous tobacco cooperative marketing associations have been formed by producers, and at some time during the last 2 decades one or more such associations have existed for types of tobacco covering over 95 percent of the total tobacco production of the United States and Puerto Rico. Although these associations have attempted progressively to benefit from the experience of previous associations, to date practically all of them have failed to bring about orderly marketing of their tobacco. Most of them have discontinued operation entirely.

Probably the prices offered for tobacco in any year are calculated to bring forth marketings in subsequent years in line with the quantity of tobacco desired. Farmers are unable, however, to recognize the limits of the market or to act collectively in offering on the market this desired quantity. They tend, because of fixed costs and available production facilities, to produce a maximum quantity of tobacco without regard to market demands. As a result, marketings frequently exceed the quantity desired and in order to avoid recurrence of a similar situation as well as to offset larger handling and storage charges buyers pay prices which may be disastrously low for farmers.

There is little if any relationship between the prices received by farmers and the price paid by the consumer for manufactured tobacco products. The

wholesale and retail prices at which tobacco products are sold are influenced by the unusually great amount of fixed or invariable elements of cost. For example, the Federal tax on a package of 20 cigarettes, weighing not more than 3 pounds per thousand, regardless of the quality, price of unmanufactured tobacco, and general business conditions, remains unchanged. In some instances advertising policies have been directed toward the creation of brand and taste preferences which would persist notwithstanding the stability of the retail price.

The average price received by farmers for all types of tobacco in the United States declined from 18.3 cents per pound in 1929 to 10.5 cents per pound in 1932, and as a result farmers' income from tobacco declined from 281 million dollars to 107 million dollars for the same period. At the same time, the wholesale price of cigarettes was advanced from $6 per thousand to $6.85 per thousand, and the profits of 52 leading tobacco manufacturers increased from 134 million dollars to 146 million dollars.

From the fact that manufacturers follow fixed-price policies (relatively), that the taxes on tobacco products do not vary, and that the demand for manufactured tobacco is relatively inelastic, the normal response to lowered farm prices, i. e., increased consumption with the consequent elimination of surpluses, does not follow. In fact, as the quantity consumed is relatively constant, producers with excessive marketings are in an unusually weak bargaining position and may suffer from unduly depressed prices which react on them but do not greatly alter the level of consumption.

The conditions attached to the marketing of tobacco widely affect those persons to whom farmers may become indebted. The interests of the bankers, merchants, fertilizer dealers, and insurance companies lie in the existence of a satisfactory market for tobacco. The impairment of income resulting from the disorderly marketing increases the hazards of those who extend credit to farmers engaged in production and marketing of tobacco.

Table IV indicates the number of farms changing ownership through voluntary sales, tax-delinquency sales and mortgage-foreclosure sales and bankruptcy. It will be noted that voluntary sales declined drastically as a result of the disorderly situation existing during years of excessive marketing while the number of tax-delinquency sales and mortgage-foreclosure sales increased very substantially.

The number of bank suspensions in those States in which the sale of tobacco affords an important source of income has been excessively great in those years in which a disorderly situation has existed in these markets. Table V shows that, in five important tobacco States, from 1929 to 1931 while the farm value of tobacco was reduced by more than one-half, the number of bank suspensions trebled.

As in the case of other agricultural commodities, the quantity of tobacco which farmers have to market is influenced by natural causes beyond their control. Statistics with respect to tobacco production indicate that, notwithstanding the fact that the plants are transplanted from seedbeds to the field and the crop undergoes intensive till-

age, the yield per acre of all tobacco has varied within the last 10 years from a low of 725 pounds in 1932 to a high of 903 pounds in 1935. Furthermore, the annual acreage is influenced by weather conditions when the plants are set and by the effect of disease on plants. The lack of moisture or attacks of disease may substantially reduce the acreage of tobacco planted, and conversely, very favorable conditions may result in plantings larger than usual. Under such circumstances disorderly marketing conditions can very easily develop in years of high yield.

DISORDERLY MARKETING AFFECTS INTERSTATE AND FOREIGN COMMERCE

The disorderly marketing of tobacco affects the volume marketed in interstate and foreign commerce during a particular marketing season as well as in subsequent years. It causes overcrowding and congestion of existing facilities. Some of the lower grades of tobacco which normally are marketable remain unsold. With large and burdensome stocks on hand, manufacturers and dealers offer lower prices. As a consequence, marketings by farmers in subsequent years are reduced. Under such conditions, with no means of regulating marketings, farmers often produce for market more or less than can be handled in an orderly manner.

Disorderly marketing which causes sharp reductions in the price of tobacco tends to injure and destroy commerce therein. For example, a survey conducted in Virginia showed that growers of flue-cured and fire-cured tobacco were unable to market from 8 to 15 percent of their 1931 and 1932 crops.

With improved market conditions, growers estidated that less than 2 percent of the 1933 and 1934 crops was not sold. While similar estimates are not available for other States, in all probability a considerable quantity of tobacco could not be sold from the 1931 and 1932 crops.

Disorderly marketing of tobacco has created such intolerable conditions in the areas affected as to result in some instances in physical violence or complete stoppage for a period of the normal marketing process. Notable instances of this were the difficulties which culminated in the so-called night rider activities in the tobacco areas of Kentucky and Tennessee; the widespread closing of tobacco markets for varying periods of time, which followed the drastic declines of tobacco prices after the World War; and a similar closing of auction markets because of low prices during the early part of the 1933 tobacco-marketing season.

With the inauguration of the Agricultural Adjustment Administration tobacco program including the 1933 marketing agreements, designed to adjust marketings to demand, immediate relief was experienced in dealing with the latter situation. Markets were reopened; the spoilage of tobacco on markets was stopped; prices were advanced to levels acceptable to farmers; and an orderly flow of tobacco in the commerce was resumed. A basis of the willingness of tobacco manufacturers to pay higher prices on the market for the 1933 crop than had been paid prior to the closing of the markets, was the assurance which they had that the operation of the tobacco program with respect to the 1934 crop would tend to keep the quantity of that crop offered on the market in line with demand.

Disorderly marketing causes a disparity between the price for this commodity and industrial products, with a consequent diminution of the volume of commerce in industrial products. Table VI, which shows the relation of farm income to new car registrations, shows in a forceful manner the reduction of trade which follows the diminution of agricultural income.

In 1926, when the total cash income of America's farmers was $9,658,000,000 this group spent approximately $2,867,000,000 for goods used in production and $4,478,000,000 for goods for living. In 1932, when disorderly marketing conditions had reduced the cash income of farmers to $4,201,000,000, they reduced their expenditure for goods for use in production to $1,351,000,000 and their expenditure for consumers' goods to $1,302,000,000. The decline in trade associating with disorderly marketing conditions in agriculture, as well as the growth of trade associated with orderly conditions, is very vividly shown by the extent to which carloadings destined from industrial areas for the southeastern agricultural area increased rapidly from 1932 to 1933 and 1934.

Total shipments, by groups of commodities

Group	Year 1 (July 1, 1932, to June 30, 1933)	Year 2 (July 1, 1933 to June 30, 1934)	Percent of increase year 2 over year 1	Year 3 (July 1, 1934, to June 30, 1935)	Percent of increase year 3 over year 2	Percent of increase year 3 over year 1
	Pounds	*Pounds*		*Pounds*		
Agricultural	56,473,000	99,278,000	75.8	136,480,000	37.5	141.
Domestic and personal	115,553,000	182,309,000	57.6	279,778,000	53.5	141.9
Industrial and commercial	821,431,000	1,179,189,000	43.6	1,604,107,000	36.0	95.1
General	1,100,499,000	1,445,052,000	31.3	2,121,363,000	46.8	92.8
Total	2,094,056,000	2,905,828,000	38.8	4,141,728,000	42.5	97.8

Total shipments of manufactured commodities from the industrial area into the southeastern region over four important railroads, as indicated in the above table, showed a gain of 38.8 percent in year 2, and 97.8 in year 3. The percentage increase was greatest in year 3 in the case of domestic and personal goods, the increase being 141.9 percent.

It is obvious from the foregoing that the disorderly marketing of an excessively abnormal supply affects, burdens, and obstructs foreign and interstate commerce.

* * * * * * *

TABLE II.—*Tobacco, flue-cured; distribution of production and processing by specified States*

State	3-year average production, 1931-32 [1]	Percentage distribution of production	Amount processed in State [2]	Percentage distribution of processed tobacco	Excess production over processed tobacco
	Pounds		*Pounds*		*Pounds*
United States, total	595,087,000	100.0	282,500,000	100.0	312,587,000
California	0	0	8,192,000	2.9	−8,192,000
Florida	3,122,000	0.5	0	0	3,122,000
Georgia	42,887,000	7.2	0	0	42,887,000
Kentucky	0	0	25,708,000	9.1	−25,708,000
Missouri	0	0	848,000	.3	−848,000
New York	0	0	585,000	.2	−585,000
North Carolina	432,186,000	72.6	152,832,000	54.1	279,354,000
Ohio	0	0	5,937,000	2.1	−5,933,000
South Carolina	65,929,000	11.1	0	0	65,929,000
Virginia	50,963,000	8.6	74,862,000	26.5	−23,899,000
All other	0	0	13,560,000	4.8	−13,560,000

[1] Compiled from reports of the Bureau of Agricultural Economics.

[2] Compiled from reports of the Bureau of Internal Revenue showing the amount of tobacco by types put into process by collecting districts. Leaf from which stem was not removed was converted to farm weight on the basis of 1 pound processing weight being equivalent to 1.129 pounds farm weight. Leaf from which stem had been removed converted to farm weight on the basis of 1 pound processing weight being equivalent to 1.447 pounds farm weight.

TABLE III.—*Number of factories manufacturing tobacco products*

District	Number of factories [1]			
	In business Jan. 1, 1935	Opened	Closed	In business Jan. 1, 1936
Arkansas	1	0	0	1
First California	13	0	0	13
Sixth California	14	2	3	13
Colorado	2	0	0	2
Connecticut	9	0	0	9
Delaware	1	0	0	1
Florida	3	2	1	4
Georgia	1	0	0	1
First Illinois	51	5	6	50
Eighth Illinois	42	1	8	35
Indiana	30	3	1	32
Iowa	18	1	2	17
Kansas	5	0	1	4
Kentucky	41	5	6	40
Louisiana	1	0	1	0
Maryland	2	0	0	2
Massachusetts	28	1	4	25
Michigan	23	1	4	20
Minnesota	23	1	4	20
First Missouri	11	0	1	10
Sixth Missouri	1	0	0	1
Montana	3	1	0	4
Nebraska	7	1	0	8
New Hampshire	2	0	0	2
First New Jersey	1	0	0	1
Fifth New Jersey	13	2	2	13
First New York	21	0	0	21
Second New York	44	3	3	44
Third New York	9	1	1	9
Fourteenth New York	9	0	1	8
Twenty-first New York	32	0	2	30
Twenty-eighth New York	27	3	5	25
North Carolina	12	1	0	13
First Ohio	17	1	2	16
Tenth Ohio	8	1	1	8
Eleventh Ohio	1	0	0	1
Eighteenth Ohio	37	0	6	31
Oregon	2	0	0	2
First Pennsylvania	65	8	7	66
Twelfth Pennsylvania	7	0	1	6
Twenty-third Pennsylvania	17	1	1	17
Rhode Island	4	1	0	5
South Carolina	2	0	0	2
South Dakota	1	0	0	1
Tennessee	17	2	5	14
First Texas	3	0	2	1
Second Texas	1	0	1	0
Utah	1	0	0	1
Virginia	8	0	1	7
Washington	1	1	1	1

[1] Includes only those producing a taxable product, excluding 241 quasi manufacturers.

TABLE III.—*Number of factories manufacturing tobacco products*—Continued

District	Number of factories			
	In business Jan. 1, 1935	Opened	Closed	In business Jan. 1, 1936
West Virginia	6	1	0	7
Wisconsin	40	0	2	38
Total, 1935	738	50	86	702
Total, 1934	765	65	92	738
Increase	0	0	0	0
Decrease	27	15	6	36

Source: Annual Report of the Commissioner of Internal Revenue, 1936.

TABLE IV.—*Number of farms changing ownership by various methods*

[Number per 1,000 farms]

	Virginia	North Carolina	Georgia	Kentucky	Tennessee	United States
Voluntary sales and trades[1]—12 months beginning Mar. 16:						
1929	16.3	19.1	17.5	30.0	18.5	23.7
1930	13.7	16.5	10.9	27.2	16.7	19.0
1931	9.8	11.0	10.6	19.0	18.0	16.2
1932	14.6	13.5	16.2	21.0	19.5	16.8
1933	12.6	19.0	18.8	20.1	20.0	17.8
1934	16.8	20.0	18.6	23.4	23.5	19.4
1935	20.6	25.4	21.7	28.9	28.7	24.0
Delinquent tax sales—12 months beginning Mar. 16:						
1929	2.6	10.8	3.5	8.4	2.3	5.1
1930	6.7	22.3	5.9	10.3	3.6	7.4
1931	9.5	35.6	10.0	21.9	10.1	13.3
1932	15.3	43.8	13.7	17.0	14.5	15.3
1933	13.6	25.1	11.9	10.1	8.1	11.1
1934	5.1	17.3	6.3	6.9	5.6	7.3
1935	3.8	10.7	4.0	5.5	4.1	5.9
Foreclosure of mortgages, bankruptcy, etc.[2]—12 months beginning Mar. 16:						
1929	10.4	15.0	18.5	12.6	8.8	15.7
1930	15.2	20.0	27.4	12.1	10.9	16.7
1931	20.3	32.6	26.8	17.9	23.0	28.4
1932	28.0	40.8	34.9	31.0	34.2	38.8
1933	19.6	29.6	24.3	16.1	24.2	28.0
1934	14.6	15.0	11.8	14.9	16.7	21.0
1935	15.1	15.2	12.5	15.8	14.3	20.3

[1] Including contracts to purchase (but not options).

[2] Including loss of title by default of contract, sales to avoid foreclosure, and surrender of title or other transfers to avoid foreclosure.

Compiled from reports of the Bureau of Agricultural Economics.

TABLE V.—*Number of bank suspensions and farm value of tobacco, Kentucky, Tennessee, Virginia, North Carolina, and South Carolina, 1922–32*

Year	Total for 5 States	Farm value of tobacco	Year	Total for 5 States	Farm value of tobacco
1922	28	$232,200,000	1930	189	$162,200,000
1923	51	222,200,000	1931	192	99,800,000
1924	49	181,600,000	1932	124	85,400,000
1925	74	179,300,000	1933	224	156,700,000
1926	79	183,900,000	1934	4	198,500,000
1927	68	197,600,000	1935	3	200,300,000
1928	48	215,300,000	1936	6	203,300,000
1929	62	215,500,000			

TABLE VI.—*Farm cash income*[1] *and registrations of new motor cars*[2] *in principal tobacco-producing States*

	1928–29	1929–30	1930–31	1931–32	1932–33	1933–34	1934–35	1935–36
Virginia:								
Farm income	146	156	104	83	62	78	91	106
Registrations	65	68	46	32	22	34	50	61
North Carolina:								
Farm income	279	231	177	116	98	171	219	217
Registrations	74	56	36	26	22	48	65	88
South Carolina:								
Farm income	117	121	97	61	48	70	82	91
Registrations	34	30	19	11	10	23	27	39
Georgia:								
Farm income	193	207	156	90	54	103	120	134
Registrations	43	40	31	21	19	39	47	55
Kentucky:								
Farm income	175	172	118	91	74	81	95	107
Registrations	56	52	32	22	19	31	39	50
Tennessee:								
Farm income	161	161	109	85	67	85	95	102
Registrations	55	55	31	19	16	30	44	52

[1] Farm cash income covers crop year for crops and calendar year for livestock and livestock products. Rental and benefit payments made under Agricultural Adjustment Administration not included. Source: Bureau of Agricultural Economics.

[2] Registrations of new passenger cars and new commercial cars covering the period July-June. Source: R. L. Polk & Co., Detroit, Mich.

C. S. Rept. 1295, 75TH CONG., 2D SESS.

CALENDAR NO. 1347

75th CONGRESS, 2d Session — SENATE — REPORT No. 1295

PROVIDING AN ADEQUATE AND BALANCED FLOW OF THE MAJOR AGRICULTURAL COMMODITIES IN INTERSTATE AND FOREIGN COMMERCE, AND FOR OTHER PURPOSES

NOVEMBER 16 (calendar day, NOVEMBER 22), 1937.—Ordered to be printed with an illustration

Mr. SMITH, from the Committee on Agriculture and Forestry, submitted the following

REPORT

[To accompany S. 2787]

The Committee on Agriculture and Forestry, to whom was referred the bill (S. 2787) providing for an adequate and balanced flow of the major agricultural commodities in interstate and foreign commerce (Agricultural Adjustment Act of 1937), having considered the same, report thereon favorably with a recommendation that the bill, as amended, do pass.

A subcommittee composed of Mr. Smith, Mr. McGill, Mr. Bankhead, Mr. Bilbo, and Mr. Ellender was appointed by the chairman to draft the committee report to accompany this bill.

In the bill it is declared to be the policy of Congress to regulate interstate and foreign commerce in cotton, wheat, corn, tobacco, and rice to the extent necessary to provide an adequate and balanced flow of such commodities. Such a flow can follow

only from the leveling out of the recurring surpluses and shortage, that burden and obstruct interstate and foreign commerce in such products.

One of the results of such a policy will be the maintenance of parity prices to farmers for cotton, wheat, corn, tobacco, and rice domestically consumed and exported and parity of income for farmers engaged in marketing such commodities. Parity prices are those which will give the farmer as great a purchasing power for his cotton, wheat, corn, tobacco, and rice as those commodities had during the base period 1909–14, or in case of tobacco 1919–29. Further without interfering with such prices adequate supplies will be maintained in years of drought, flood, or other adverse conditions as well as in years of plenty, i. e., an ever-normal granary that will protect consumers from unreasonably high prices. Finally our national soil resources will be conserved and wasteful use of our soil fertility prevented.

* * * * *

TITLE IV.—TOBACCO

This title provides for regulation of the marketing of tobacco. It comes into operation only when abnormally excessive supplies are found to exist. It provides for such regulation through the establishment of marketing quotas for tobacco and for the collection of penalties from those who acquire from producers tobacco marketed in excess of the marketing quota for the producer's farm. The definitions found in title VI, section 61, are applicable to this title. General provisions for its administration are found in sections 62 and 63. It applies

separately to flue-cured, fire-cured, dark air-cured, burley, Maryland, and cigar filler and binder tobacco as distinct kinds of tobacco.

Section 40. This section is a finding by Congress of the basic facts which give rise to the need for the regulation of tobacco marketings. It contains findings that the marketing of tobacco is one of the great basic industries of the United States, that tobacco is sold on a Nationwide market and, with its products, moves almost wholly in interstate and foreign commerce; that the marketing of tobacco directly affects interstate commerce; and that stable conditions in the industry are necessary to the general welfare. These findings stated in general terms are fully supported by the statistics available to show the scope and character of the business of distributing tobacco from producers to consumers.

The section contains the further finding that farmers producing tobacco are widely scattered throughout the Nation, that their operations are subject to natural forces beyond their control, that in many cases they carry on their operations on leased land and borrowed money, and that in general they are not in a position, without Federal assistance, to so coordinate their operations as to be able to control effectively the orderly marketings of tobacco. The section contains a finding that these conditions result in abnormally excessive supplies of tobacco being produced and dumped indiscriminately on the national market.

Subsection (b) contains a finding that the disorderly marketing of these excessive supplies burdens and obstructs interstate commerce in tobacco by materially affecting the volume of tobacco marketed in interstate commerce, and by disrupting

the orderly marketing of tobacco in interstate commerce. These two results of excessive supplies are practically axiomatic. There is a further finding that the marketing of abnormally excessive supplies reduces the price of tobacco and ultimately is injurious to commerce in tobacco. The marketing of excessive supplies of tobacco has been consistently accompanied by reduced prices. Experience has shown that excessive reduction in the amount produced follows the marketing of exceedingly large crops at low prices, with consequent excessive increase in prices and restriction of volume in subsequent marketing seasons.

There is a further finding that the reductio in price of tobacco caused by the marketing of excessive supplies results in a reduction of interstate commerce in industrial products. Long experience has demonstrated that farmers' purchases of commodities which flow in interstate commerce are acutely and directly affected by the amount of money they get from the sale of their products, and that commerce in industrial products is affected adversely by the low farm incomes which result from the marketing of excessively large crops at disastrous prices. The section concludes with a finding that the provision made for regulating the marketing of tobacco by producers becomes necessary whenever abnormally excessive supplies of tobacco exist. It is to be noted that the marketing quotas provided for in the title are not continuously effective. They come into operation only when the supply of tobacco is more than enough to meet normal requirements for domestic consumption and exports and to maintain stocks adequate to meet requirements when adverse condi-

tions cut production below consumption. This quantity, as defined in the act, consists of a normal year's domestic consumption and exports plus 175 percent of a normal year's domestic consumption and 65 percent of a normal year's exports, which is defined in the act as normal production, plus an additional reserve supply of 5 percent of this normal production. This level is called the reserve level.

Section 41 provides the mechanics for making the quotas effective. It requires the Secretary to proclaim the amount of the total supply of tobacco not later than December 1 of any year in which, prior to November 15, he has found that the total supply exceeds the reserve supply level. It provides that in such a case he shall specify the amount of a national marketing quota in terms of the total quantity of tobacco which may be marketed. The amount is to be such as will make available for marketing a supply equal to the reserve supply level. The quota so determined becomes effective during the next succeeding marketing year.

The section also requires the Secretary to conduct a referendum within 30 days after he issues the proclamation, to determine whether farmers who will be subject to the marketing quota favor or oppose it. It provides that if he finds that more than one-third oppose the quota, he shall proclaim that fact before the 1st of January, whereupon the quota previously announced becomes ineffective. The section provides that any quota for the 1938–39 marketing year may be made effective by an announcement by the Secretary not later than February 1, 1938, and that the results of the referendum

may be deferred in that year until not later than the 1st of March.

Section 42 provides for the apportionment of the national marketing quota among the States on the basis of the total production of tobacco in each State during the preceding 5 calendar years. It provides that this apportionment shall take into account tobacco base acreages and goals established under previous agricultural adjustment and conservation programs and requires that adjustments be made for abnormal conditions of production, for small farms, and for trends during the 5-year period. These provisions are designed to make possible a fairer apportionment than would result from the use of a purely mathematical basis. The section provides also for the use of not in excess of 3 percent of the marketing quota for any State for allotment among farms in the State on which tobacco is being produced for the first time in 10 years. It provides that the apportionment of this 3 percent shall be based upon the land, labor, and equipment available for the production of tobacco on such farms, the crop-rotation practices that have been employed on such farms, and the soil and other physical factors on such farms which affect their capacity to produce tobacco. The quotas for such farms are required to be limited to not more than 75 percent of the quotas established for farms which have a similar capacity to produce tobacco but which have produced tobacco during the 10-year period.

Subsection (d) provides that marketing quotas may be transferred, but only subject to such conditions and in such manner as the Secretary may prescribe.

Section 43 (a) provides that a marketing quota may be increased if the Secretary finds that its operation is preventing a normal supply of tobacco from becoming available.

Subsection (b) provides for the termination of any marketing quota if the Secretary finds such termination necessary because of an increased demand resulting from a war on national emergency.

Section 44 prescribes a penalty, payable by any person who knowingly acquires tobacco marketed by a producer from a farm in excess of the marketing quota. The penalty is 50 percent of the market price of the tobacco on the day of such acquisition or 3 cents per pound in case of flue-cured, Maryland, or burley tobacco, and 2 cents per pound in case of all other tobacco, if these per-pound rates are higher than 50 percent of the market price. A purchaser is permitted to deduct the amount of the penalty from the purchase price.

Subsection (b) provides that the Secretary may require persons having to do with the production, marketing, and processing of tobacco to keep records and report information necessary to enable him to carry out the provisions of the title. It provides also for the examination of books and records which the Secretary has reason to believe are relevant to a determination of the correctness of any such report or record or to the obtaining of information required to be furnished in any report. The section also provides a fine for any person failing to make any report or keep any such records required or making a false report or record.

Subsection (c) confers jurisdiction upon the district courts of the United States to enforce the provisions of the section and imposes a duty upon district attorneys to commence proceedings to collect the penalties, if and when the Secretary requests them to do so. The section provides also that the remedies and penalties of the section are additional to existing remedies and penalties.

Subsection (d) requires that all information required by the Secretary pursuant to the section be kept confidential, except that it may be disclosed in a suit or hearing involving the administration of the marketing-quota provisions for tobacco.

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U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No. 505.—October Term, 1938.

James H. Mulford, et al., Appellants, *vs.* Nat Smith, et al.	Appeal from the District Court of the United States for the Middle District of Georgia.

[April 17, 1939.]

Mr. Justice Roberts delivered the opinion of the Court.

The appellants, producers of flue-cured tobacco, assert that the Agricultural Adjustment Act of 1938,[1] is unconstitutional as it affects their 1938 crop.

The portions of the statute involved are those included in Title III, providing marketing quotas for flue-cured tobacco.[2] The Act directs that when the supply is found to exceed the level defined in the Act as the "reserve supply level" a national marketing quota shall become effective which will permit enough flue-cured tobacco to be marketed during the ensuing marketing year to maintain the supply at the reserve supply level. The quota is to be apportioned to the farms on which tobacco is grown. Penalties are to be paid by tobacco auction warehousemen for marketing tobacco from a farm in excess of its quota.

Section 311 is a finding by the Congress that the marketing of tobacco is a basic industry which directly affects interstate and foreign commerce; that stable conditions in such marketing are necessary to the general welfare; that tobacco is sold on a national market and it and its products move almost wholly in interstate and foreign commerce; that without federal assistance the farmers are unable to bring about orderly marketing, with the consequence

[1] 52 Stat. 31, as amended March 26, 1938, 52 Stat. 120, April 7, 1938, 52 Stat. 202, May 31, 1938, 52 Stat. 586, and June 20, 1938, 52 Stat. 775; U. S. C. Supp. IV, Title 7, §§ 1281, *et seq.*

[2] Title III, Subtitle B, Marketing Quotas, Part I, marketing quotas—tobacco, §§ 311-314, inclusive. See also § 301, Definitions. §§ 361-375, inclusive, administrative provisions; §§ 388 and 389 relating to personnel.

that abnormally excessive supplies are produced and dumped indiscriminately on the national market; that this disorderly marketing of excess supply burdens and obstructs interstate and foreign commerce, causes reduction in prices and consequent injury to commerce, creates disparity between the prices of tobacco in interstate and foreign commerce and the prices of industrial products in such commerce, and diminishes the volume of interstate commerce in industrial products; and that the establishment of quotas as provided by the Act is necessary and appropriate to promote, foster and obtain an orderly flow of tobacco in interstate and foreign commerce.

There is no provision for continuous regulation of tobacco marketing, but, by Section 312(a), regulation becomes effective in any year only if, on November 15th, the Secretary finds that the total supply of tobacco as of July 1st exceeded the reserve supply level which is defined in the Act.[3] If he so finds, he shall, by December 1st, proclaim the total supply and a national marketing quota shall be in effect throughout the marketing year which commences the following July 1st. The quota is to be the amount which the Secretary finds will make available during the ensuing marketing year a supply of tobacco equal to the reserve supply level. As it was not passed until after November 15, 1937, the Act provided, with respect to the marketing year beginning July 1, 1938, for which the quotas involved in this case were in effect, that the determination and proclamation of the national marketing quota should be made within fifteen days after the statute's approval.[4]

Within thirty days after proclamation, the Secretary is to conduct a referendum of the producers of the crop of the preceding year to ascertain whether they favor or oppose the imposition of a quota. If more than one-third oppose, the Secretary is to proclaim the result before January 1st and the quota is not to be effective.[5]

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[3] The total supply, the carry-over for a marketing year, the reserve supply level, the normal supply, a normal year's domestic consumption, and a normal year's exports, are defined in Section 301.

[4] Section 312(d).

[5] Section 312(c). With respect to 1938 quotas, the proclamation of the result of the referendum was to be made within forty-five days after approval of the Act. Section 312(d).

By Section 313(a) it is directed that the quota is to be first apportioned among the states based on the total quantity of tobacco produced in each state during the five years immediately preceding the year in question, plus the normal production of any acreage diverted under any agricultural adjustment and conservation program in any of the years. The basic determination is to be adjusted to correct state allotments, giving due consideration to seed bed or other plant diseases, production trends, or abnormal producing conditions which affected production in the several states during the five-year period, and to make required provision for allotments to small farms. A limit is set below which the quota of any state may not be reduced.

The Act provides for the apportionment of the state allotment amongst the farms which produced tobacco in the current year or have produced previously in one or more of the four preceding years. Apportionment to these farms is to be made on the basis of past marketing, after due allowance for drought, flood, hail, and other abnormal weather conditions, plant bed and other diseases, land, labor, and equipment available for the production of tobacco, crop-rotation practices, and soil and other physical factors affecting production. A limit is fixed below which the adjustment may not reduce the production of a given farm. Allotment to new tobacco farms is to be made on a slightly different basis.[6]

Apportionment of the quota amongst individual farms is to be by local committees of farmers according to standards prescribed in the Act, amplified by regulations and instructions issued by the Secretary. Each farmer is to be notified of his marketing quota and the quotas of individual farms are to be kept available for public inspection in the county or district where the farm is located. If the farmer is dissatisfied with his allotment he may have his quota reviewed by a local review committee, and, if dissatisfied with the determination of that committee, he may obtain judicial review.

Section 314 provides that if tobacco in excess of the quota for the farm on which the tobacco is produced is marketed through a warehouseman, the latter must pay to the Secretary a penalty equal to fifty per cent. of the market price of the excess, and may

[6] Sections 313(b) and 313(c).

deduct an amount equivalent to the penalty from the price paid the producer.[7]

Section 376 gives the United States a civil action for the recovery of unpaid penalties.[8]

A few days before the 1938 auction sales were to take place, the appellants, who produce flue-cured tobacco in southern Georgia and northern Florida, filed a bill in equity in a Georgia state court against local warehousemen to restrain them from deducting penalties under the Act from the sales price of tobacco to be sold at their auction warehouses on behalf of appellants. The bill alleged that the Act is unconstitutional; that it illegally commands the defendants to deduct penalties, pay them over to the Secretary, who must cover them into the treasury of the United States; that, if the defendants should make the required payments, the amounts paid by them would aggregate so large a sum that they would be unable to satisfy judgments in actions brought to recover the illegal payments. The court granted a preliminary injunction and ordered the defendant warehousemen to pay the amounts of the penalties into the registry of the court. The cause was removed to the United States District Court for the Middle District of Georgia. The District Court continued the injunction, modified the order to require the payments to be made into its registry, the auction sales were held, and payments into the court were made. The United States was permitted to intervene as a defendant.[9] The warehousemen and the United States filed answers. The cause was set down before a court consisting of three judges,[10] which heard it on a stipulation of facts and entered a decree dismissing the bill.[11]

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7 If the tobacco is marketed directly to a person outside the United States, the producer is required to pay the penalty. If the tobacco is sold by the grower directly to a purchaser without intervention by the warehouseman or other agent, the buyer is required to pay the penalty, but may deduct an equivalent amount from the purchase price. Sections 314, 372, 373. The penalty is to be three cents per pound if that rate is higher than 50% of the market price. Section 314.

8 The Secretary may make regulations necessary for identifying tobacco subject to quotas, Section 375; and requiring the keeping of records and the making of reports. The Act imposes upon handlers other than producers a fine of $500 upon conviction of failure to make any report or keep any record, or for making any false report or record. Section 373(a) and (b).

9 Act of August 24, 1937, c. 754, Sec. 1, 50 Stat. 751; U. S. C. Supp. III, Tit. 28, § 401.

10 *Ibid*, U. S. C. Supp. III, Tit. 28, § 380(a).

11 24 F. Supp. 919.

Before coming to the merits we inquire whether the court below had jurisdiction as a federal court or as a court of equity. Though no diversity of citizenship is alleged, nor is any amount in controversy asserted so as to confer jurisdiction under subsection (1)[12] of Section 24 of the Judicial Code, the case falls within subsection (8)[13] which confers jurisdiction upon District Courts "of all suits and proceedings arising under any law regulating commerce." Maintenance of the bill for injunction is not forbidden by R. S. 3224,[14] which applies only to a suit to restrain assessment or collection of a tax. Under the averments of the bill the defendant warehousemen would be wrongdoers if they deducted and paid over the prescribed penalties, but no action at law would be adequate to redress the damage thus inflicted. It appears that the total of the penalties involved in this suit is some $374,000. The allegation that the warehousemen would be unable to respond in actions for sums aggregating this amount has, therefore, reasonable basis. Before any such action could be initiated the penal sum would have been paid to the Secretary of Agriculture and by him to the Treasurer of the United States and covered into the general funds of the Treasury. No action could be maintained against the warehousemen or either of these officials for disposing of the penal sums in accordance with the terms of the Act unless prior notice not to do so had been served upon each of them. In the light of the fact that the appellants received notice of their quotas only a few days before the actual marketing season opened, the maintenance of actions based upon collection of the penalties would have been a practical impossibility. We are of opinion, therefore, that a case is stated for the interposition of a court of equity.

The appellants plant themselves upon three propositions: (1) that the Act is a statutory plan to control agricultural production and, therefore, beyond the powers delegated to Congress; (2) that the standard for calculating farm quotas is uncertain, vague, and indefinite, resulting in an unconstitutional delegation of legislative power to the Secretary; (3) that, as applied to appellants' 1938 crop, the Act takes their property without due process of law.

First. The statute does not purport to control production. It sets no limit upon the acreage which may be planted or produced

[12] U. S. C. Tit. 28, § 41(1).
[13] U. S. C. Tit. 28, § 41(8).
[14] U. S. C. Tit. 26, § 1543.

and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota. It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce,—the marketing warehouse.[15] The record discloses that at least two-thirds of all flue-cured tobacco sold at auction warehouses is sold for immediate shipment to an interstate or foreign destination. In Georgia nearly one hundred per cent. of the tobacco so sold is purchased by extrastate purchasers. In markets where tobacco is sold to both interstate and intrastate purchasers it is not known, when the grower places his tobacco on the warehouse floor for sale, whether it is destined for interstate or intrastate commerce. Regulation to be effective, must, and therefore may constitutionally, apply to all sales.[16] This court has recently declared that sales of tobacco by growers through warehousemen to purchasers for removal outside the state constitute interstate commerce.[17] Any rule, such as that embodied in the Act, which is intended to foster, protect and conserve that commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress. Within these limits the exercise of the power, the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce,[18] and a fortiori to limitation of the amount of a given commodity which may be transported in such commerce. The motive of Congress in exerting the power is irrelevant to the validity of the legislation.[19]

The provisions of the Act under review constitute a regulation of interstate and foreign commerce within the competency of Congress under the power delegated to it by the Constitution.

Second. The appellants urge that the standard for allotting farm quotas is so uncertain, vague, and indefinite that it amounts to a delegation of legislative power to an executive officer and thus

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[15] Currin *v.* Wallace, No. 275 Oct. T. 1938; compare Townsend *v.* Yeoman, 301 U. S. 441.

[16] The Minnesota Rate Cases, 230 U. S. 352; The Shreveport Case, 234 U. S. 342; Currin *v.* Wallace, *supra.*

[17] Currin *v.* Wallace, *supra;* and see Dahnke-Walker Co. *v.* Bondurant, 257 U. S. 282, 290; Shafer *v.* Farmers Grain Co., 268 U. S. 189, 198. Compare Lemke *v.* Farmers Grain Co., 258 U. S. 50.

[18] Champion *v.* Ames, 188 U. S. 321; Hipolite Egg Co. *v.* United States, 220 U. S. 45; Hoke *v.* United States, 227 U. S. 308; Brooks *v.* United States, 267 U. S. 432; Gooch *v.* United States, 297 U. S. 124.

[19] Story, Commentaries on the Constitution (4th Ed.), Secs. 965, 1079, 1088, 1089.

violates the Constitutional requirement that laws shall be enacted by the Congress.

What has been said in summarizing the provisions of the Act sufficiently discloses that definite standards are laid down for the government of the Secretary, first, in fixing the quota and, second, in its allotment amongst states and farms. He is directed to adjust the allotments so as to allow for specified factors which have abnormally affected the production of the state or the farm in question in the test years. Certainly fairness requires that some such adjustment shall be made. The Congress has indicated in detail the considerations which are to be held in view in making these adjustments, and, in order to protect against arbitrary action, has afforded both administrative and judicial review to correct errors. This is not to confer unrestrained arbitrary power on an executive officer. In this aspect the Act is valid within the decisions of this court respecting delegation to administrative officers.[20]

Third. In support of their contention that the Act, as applied to the crop year 1938, deprives them of their property without due process of law in violation of the Fifth Amendment, the appellants rely on the following undisputed facts.

Tobacco growers in southern Georgia and northern Florida began to arrange for the planting of their 1938 crop in December, 1937, when it was necessary for them to prepare beds for the planting of the seeds. Thereafter it was necessary to cultivate the seed beds, sow and water the seed, cover the beds with cloth, and otherwise care for the plants until they were large enough to be transplanted. At the date of approval of the Act each of the plaintiffs had planted his seed beds and, about the middle of March, began transplanting into the fields, which were prepared and fertilized at large expense. The plants were thereafter cultivated and sprayed, and harvesting began during June and continued during July, followed by the curing and grading of the tobacco.

All of these activities involved labor and expense. The production of flue-cured tobacco requires, at prevailing price levels, a cash outlay of between thirty and forty dollars per acre for fertilizer, plant bed covering, twine, poison, etc. The use of animals and permanent and semi-permanent equipment demands an aver-

[20] United States *v.* Grimaud, 220 U. S. 506; Avent *v.* United States, 266 U. S. 127; Hampton & Co. *v.* United States, 276 U. S. 394; New York Central Securities Corp. *v.* United States, 287 U. S. 12; Currin *v.* Wallace, *supra*.

age expenditure, over a period of years, ranging from twenty to thirty dollars an acre. The labor expended per acre is between three hundred and four hundred man-hours. The total cost per pound varies from ten cents to twenty cents.

The marketing season for flue-cured tobacco in Georgia and Florida commences about August 1st of each year. Each of the appellants was notified of the quota of his farm shortly before the opening of the auction markets. Prior to the receipt of notice each of them had largely, if not wholly, completed planting, cultivating, harvesting, curing and grading his tobacco. Until receipt of notice none knew, or could have known, the exact amount of his quota, although, at the time of filing the bill, each had concluded from available information that he would probably market tobacco in excess of any quota for his farm.

The Act was approved February 16, 1938. The Secretary proclaimed a quota for flue-cured tobacco on February 18th and, on the same date, issued instructions for holding a referendum on March 12th. March 25th the Secretary proclaimed the result of the referendum which was favorable to the imposition of a national marketing quota. In June he issued regulations governing the fixing of farm quotas within the states. July 22nd he determined the apportionment as between states and issued regulations relative to the records to be kept by warehousemen and others. Shortly before the markets opened each appellant received notice of the allotment to his farm.

On the basis of these facts it is argued that the statute operated retroactively and therefore amounted to a taking of appellants' property without due process. The argument overlooks the circumstance that the statute operates not on farm production, as the appellants insist, but upon the marketing of their tobacco in interstate commerce. The law, enacted in February, affected the marketing which was to take place about August 1st following, and so was prospective in its operation upon the activity it regulated. The Act did not prevent any producer from holding over the excess tobacco produced, or processing and storing it for sale in a later year; and the circumstance that the producers in Georgia and Florida had not provided facilities for these purposes is not of legal significance.

The decree is affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 505.—October Term, 1938.

James H. Mulford, et al., Appellants, vs. Nat Smith, et al. — Appeal from the District Court of the United States for the Middle District of Georgia.

[April 17, 1939.]

Mr. Justice Butler, dissenting.

Plaintiffs are farmers in Georgia and on their farms raise tobacco. They sell it in the market year when produced because, in their circumstances, they are unable to process and make it fit to be held for sale in a later year. The sales are at auction markets, through defendants who are Georgia warehousemen, to purchasers intending to take the tobacco outside the State. The Secretary of Agriculture, assuming to be empowered by the Agricultural Adjustment Act of 1938, undertook to prescribe the amount of flue-cured tobacco to be raised in 1938 in the United States, in each State, and on each farm. He failed to let plaintiffs know the quotas respectively assigned to them until after their crops had matured and were ready for marketing. Each raised more than the assigned quota.

The Act declares that, if more than the amount fixed for a farm is marketed, the warehouseman shall pay to the Secretary a penalty equal to one-half the price of the excess, but it authorizes him to retain that amount from the farmer raising and bringing it to market for sale. If, without resort to a warehouseman, the farmer sells directly to one in this country, the purchaser is required to pay the penalty but is authorized to take the amount from the purchase price. If the farmer sells directly to one outside the United States he is required to pay the penalty to the Secretary. Thus, in any event, the penalty is effectively laid upon the farmer. Enforcement of the Act will compulsorily take from plaintiffs an amount of money equal to one-half of the market value of all tobacco raised and sold by them in excess of the prescribed quotas.

In *United States* v. *Butler*, 297 U. S. 1, we held the federal government without power to control farm production. We condemned the statutory plan there sought to be enforced as repugnant to the Tenth Amendment. That scheme was devised and put in effect under the guise of exertion of power to tax. We held it to be in excess of the powers delegated to the federal government; found the tax, the appropriation of the money raised, and the directions for its disbursement, to be but the means to an unconstitutional end; showed that the Constitution confers no power to regulate production and that therefore legislation for that purpose is forbidden; emphasized the principle established by earlier decisions that a prohibited end may not be attained under pretext of exertion of powers which are granted; and finally we declared that, if Congress may use its power to tax and to spend compulsorily to regulate subjects within the reserved power of the States, that power "would become the instrument for total subversion of the governmental powers reserved to the individual States."

After failure of that measure, Congress, assuming power under the commerce clause, enacted the provisions authorizing the quota and penalties the validity of which is questioned in this case. Plaintiffs contend that the Act is a plan to control agricultural production and therefore beyond the powers delegated to Congress. The Court impliedly concedes that such a plan would be beyond congressional power, but says that the provisions do not purport to control production, set no limit upon the acreage which may be planted or produced and impose no penalty upon planting and production in excess of marketing quota. Mere inspection of the statute and Secretary's regulations unmistakably disclose purpose to raise price by lessening production. Whatever may be its declared policy or appearance, the enactment operates to control quantity raised by each farmer. It is wholly fallacious to say that the penalty is not imposed upon production. The farmer raises tobacco only for sale. Punishment for selling is the exact equivalent of punishment for raising the tobacco. The Act is therefore invalid. *United States* v. *Butler*, 297 U. S. 1. *Hammer* v. *Dagenhart*, 247 U. S. 251. See *Brooks* v. *United States*, 267 U. S. 432, 438; *Ky. Whip & Collar Co.* v. *I. C. R. Co.*, 299 U. S. 334, 350. Cf. *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362, *et seq.*

Assuming that, under *Currin* v. *Wallace*, 305 U. S. —, plaintiffs' sales in interstate commerce at defendants' auction markets are to be deemed subject to federal power under the commerce clause, the Court now rules that, within suggested limits so vague as to be unascertainable, the exercise of power under that clause, "the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce and a fortiori to limitation of the amount of a given commodity which may be transported in such commerce."

That ruling is contrary alike to reason and precedent. To support it, the Court merely cites the following cases:

The Lottery Case, (*Champion* v. *Ames*) 188 U. S. 321, held that an Act of Congress prohibiting transportation of lottery tickets in interstate commerce is not inconsistent with any limitation or restriction imposed upon exercise of the powers granted to Congress. After demonstrating the illicit character of lottery tickets, the Court said (p. 357): "We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. . . . [p. 358] It is a kind of traffic which no one can be entitled to pursue as of right."

Hipolite Egg Co. v. *United States,* 220 U. S. 45, held within federal power the provisions of the Food and Drug Act forbidding transportation in interstate commerce of food "debased by adulteration" and authorizing articles so transported to be seized as contraband.

Hoke v. *United States,* 227 U. S. 308, sustained congressional prohibition of interstate transportation of women for immoral purposes.

Brooks v. *United States,* 267 U. S. 432, upheld a statute of the United States making it a crime to transport a stolen automobile in interstate commerce.

Gooch v. *United States,* 297 U. S. 124, construed an Act of Congress making it a crime to transport a kidnapped person in interstate commerce.

Plainly these cases give no support to the view that Congress has power generally to prohibit or limit, as it may choose, transportation in interstate commerce of corn, cotton, rice, tobacco, or wheat. Our decisions establish the contrary:

Wilson v. *New*, 243 U. S. 332, upheld an Act regulating hours of service of employees of interstate carriers by rail. The Court following the teaching of earlier decisions, said (p. 346): "The extent of regulation depends on the nature and character of the subject and what is appropriate to its regulation. The powers possessed by government to deal with a subject are neither inordinately enlarged or greatly dwarfed because the power to regulate interstate commerce applies. This is illustrated by the difference between the much greater power of regulation which may be exerted as to liquor and that which may be exercised as to flour, dry-goods and other commodities. It is shown by the settled doctrine sustaining the right by regulation absolutely to prohibit lottery tickets and by the obvious consideration that such right to prohibit could not be applied to pig iron, steel rails, or most of the vast body of commodities."

Hammer v. *Dagenhart*, 247 U. S. 251, held repugnant to the commerce clause and to the Tenth Amendment an Act prohibiting transportation in interstate commerce of articles made at factories in which child labor was employed. The Court said (p. 271): "In other words, the power [granted by the commerce clause] is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that the adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate. . . . [p. 276] In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority

does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed".

Heretofore, in cases involving the power of Congress to forbid or condition transportation in interstate commerce, this Court has been careful to determine whether, in view of the nature and character of the subject, the measure could be sustained as an appropriate regulation of commerce.* If Congress had the absolute power now attributed to it by the decision just announced, the opinions in these cases were unnecessary and utterly beside the mark.

For reasons above suggested, I am of opinion:

The penalty is laid on the farmer to prevent production in excess of his quota. It is therefore invalid.

If the penalty is imposed for marketing in interstate commerce, it is a regulation not authorized by the commerce clause.

To impose penalties for marketing in excess of quotas not disclosed before planting and cultivation is to deprive plaintiffs of their liberty and property without due process of law.

The judgment of the district court should be reversed.

Mr. Justice McREYNOLDS concurs in this opinion.

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*Lottery Case, 188 U. S. 321, 355 *et seq.* United States *v.* Delaware & Hudson Co., 213 U. S. 366, 415. Hipolite Egg Co. *v.* United States, 220 U. S. 45, 57-58. Hoke *v.* United States, 227 U. S. 308, 321-323. Seven Cases *v.* United States, 239 U. S. 510, 514. Caminetti *v.* United States, 242 U. S. 470, 491-492. Hammer *v.* Dagenhart, 247 U. S. 251, 270 *et seq.* Brooks *v.* United States, 267 U. S. 432, 436-438. See Wilson *v.* New, 243 U. S. 332, 346. Cf. Clark Distilling Co. *v.* Western Md. Ry. Co., 242 U. S. 311, 325. United States *v.* Hill, 248 U. S. 420. Ky. Whip & Collar Co. *v.* I. C. R. Co., 299 U. S. 334, 346 *et seq.*